

# BAKER BOTTS LLP

101 CALIFORNIA ST.  
SUITE 3600  
SAN FRANCISCO, CALIFORNIA  
94111

TEL +1.415.291.6200  
FAX +1.415.291.6300  
BakerBotts.com

AUSTIN  
BEIJING  
BRUSSELS  
DALLAS  
DUBAI

HONG KONG  
HOUSTON

LONDON  
MOSCOW  
NEW YORK  
PALO ALTO  
RIYADH

**SAN FRANCISCO**  
WASHINGTON

January 16, 2018

VIA HAND DELIVERY

Lawrence Goldzband  
Executive Director  
San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102



SAN FRANCISCO BAY CONSERVATION  
& DEVELOPMENT COMMISSION

Re: Receipt of Acknowledgement regarding In Re: Marks Sanders and Westpoint Harbor, LLC; BCDC Enforcement Investigation No. ER2010.013; Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01

I hereby acknowledge receipt of six copies of each of the following:

1. Respondents' Objections to Executive Director's Modified Recommended Enforcement Decision and Attachments;
2. Respondents' Objections to Letter and Attachment from Citizens Committee to Complete the Refuge;
3. Respondents' Objections to Declaration of Matthew Leddy; and
4. Respondents' Response to Staff's Objections to Declaration of Mark Sanders

regarding Enforcement Investigation No. ER2010.013 and Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01, hand delivered to the address above.

Received January 16, 2018

By: \_\_\_\_\_

Name:



1 CHRISTOPHER J. CARR (CA SBN 184076)  
2 chris.carr@bakerbotts.com  
3 KEVIN M. SADLER (CA SBN 283765)  
4 kevin.sadler@bakerbotts.com  
5 KEVIN E. VICKERS (CA SBN 310190)  
6 kevin.vickers@bakerbotts.com  
7 BAKER BOTTS L.L.P.  
8 101 California Street, Suite 3600  
9 San Francisco, California 94111  
10 Telephone: (415) 291-6200  
11 Facsimile: (415) 291-6300  
12

13 *Attorneys for Mark Sanders and Westpoint Harbor, LLC*  
14

15  
16 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION  
17

18 IN THE MATTER OF:

19  
20 VIOLATION REPORT/COMPLAINT FOR THE  
21 IMPOSITION OF ADMINISTRATIVE CIVIL  
22 PENALTIES NO. ER2010.013  
23

24 PROPOSED CEASE AND DESIST AND CIVIL  
25 PENALTY ORDER NO. CDO 2018.01  
26

27 MARK SANDERS AND  
28 WESTPOINT HARBOR, LLC  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

RECEIVED  
JAN 16 2018

SAN FRANCISCO BAY CONSERVATION  
& DEVELOPMENT COMMISSION

RESPONDENTS' OBJECTIONS TO EXECUTIVE  
DIRECTOR'S MODIFIED RECOMMENDED  
ENFORCEMENT DECISION AND ATTACHMENTS

1 Respondents Mark Sanders and Westpoint Harbor, LLC (“Respondents”) re-urge,  
2 resubmit, and incorporate herein by reference the following, all of which were previously  
3 submitted prior to the Enforcement Committee hearing held on November 16, 2017:  
4 (1) Respondents’ Response to Staff’s Objections to Declaration of Mark Sanders (included here  
5 as Attachment A); (2) Respondents’ Objections to Letter and Attachment from Citizens  
6 Committee to Complete the Refuge (Attachment B); and (3) Respondents’ Objections to  
7 Declaration of Matthew Leddy (Attachment C).

8 Respondents re-urge their request to cross-examine the 16 individuals specified in  
9 Respondents’ Statement of Defense (pages 123-27),<sup>1</sup> all of whom are relied on by staff in its  
10 violation report.

11 Additionally, Respondents submit the following objections to the Executive Director’s  
12 Recommended Enforcement Decision, dated November 6, 2017, as modified by the Executive  
13 Director’s “Modification of Executive Director’s Recommended Enforcement Decision” dated  
14 January 8, 2018, (the “Recommended Enforcement Decision”), and the attachments to the same.

15 **1. Objection to BCDC staff’s violation of ministerial duty**

16 At the Enforcement Committee hearing held on November 16, 2017, the Enforcement  
17 Committee approved a motion made by Chair Scharff to “adopt the Cease and Desist Order as  
18 recommended by staff, subject to modification by agreement.” Transcript 138:16-17. Chair  
19 Scharff further clarified the intent of the motion that was approved: “If you [BCDC staff and  
20 Respondents] don’t come to an agreement then this [Proposed Cease and Desist and Civil  
21 Penalty] Order [No. CDO 2017.04] becomes the recommendation of the Committee to BCDC.”  
22 Transcript 141:7-9.

---

<sup>1</sup> John Bowers; Laurence Frank; Andrea Gaffney; Brian Gaffney; Andrea Gaut; Adrienne Klein; Matt Leddy; Steve McAdams; Brad McCrea; Ellen Miramontes; Ron Powers; Unnamed “Member of the Public” #1; Unnamed “Member of the Public” #2; Unnamed “Member of the Public” #3; Tom Sinclair; and Marc Zeppetello

1 BCDC's rules require that "[a]fter the enforcement committee or a hearing officer has  
2 closed the enforcement hearing and completed its deliberations, it shall adopt a recommended  
3 enforcement decision[.]" Cal. Code Regs. tit. 14, § 11330. At the November 16 hearing, the  
4 Enforcement Committee did just that. BCDC's rules further require "Referral of the  
5 Recommended Enforcement Decision to the Commission[.]" and state, "At least ten (10) days  
6 prior to the Commission's consideration of a recommended enforcement decision referred to it  
7 either directly by the Executive Director, by the enforcement committee, or by a hearing officer,  
8 the staff shall mail the recommended enforcement decision to all respondents and to all  
9 Commissioners." Cal. Code Regs. tit. 14, § 11331.

10 As noted in the "Modification of Executive Director's Recommended Enforcement  
11 Decision" dated January 8, 2018, the parties did not agree on appropriate modifications to the  
12 proposed order. Therefore, by the motion approved by the Enforcement Committee on  
13 November 16, 2017, Proposed Cease and Desist and Civil Penalty Order No. CDO 2017.04  
14 (Recommended Enforcement Decision, Attachment E) is the recommendation of the  
15 Enforcement Committee to the full Commission. The Executive Director has no authority to  
16 disregard the Enforcement Committee's recommendation. To the contrary, the Executive  
17 Director has a ministerial duty to send the Enforcement Committee's recommendation to the full  
18 Commission. Instead of following his ministerial duty, the Executive Director has drafted a new  
19 proposed order (Proposed Cease and Desist and Civil Penalty Order No. CDO 2018.01) (the  
20 "Proposed Order") and issued notice of a second Enforcement Committee hearing on January 18,  
21 2018. Respondents object to the Executive Director's violation of his ministerial duty.

1 **2. Objection to BCDC staff's modification of the proposed order as violative of**  
2 **Respondents' due process rights and California Evidence Code Section 1152 by relying**  
3 **on alleged discussions between BCDC staff and Respondents' counsel outside of the**  
4 **Administrative Record.**

5 The Modification of Executive Director's Recommended Enforcement Decision (January  
6 8, 2018) states that the Executive Director has modified his recommended enforcement decision  
7 by providing a revised proposed cease and desist and civil penalty order "that incorporates  
8 certain modifications" to the Proposed Order "based on the discussions between BCDC staff and  
9 Respondents' counsel." Respondents object to inclusion in the Administrative Record of this  
10 statement and the modifications to the Proposed Order on the basis that any statements made in  
11 negotiation of an offer to compromise are protected under California Evidence Code Section  
12 1152. More importantly, Respondents object to BCDC staff's decision to modify the  
13 Recommended Enforcement Decision (and the Proposed Order) on the basis of information that  
14 is wholly outside the Administrative Record, as the Executive Director admits to doing.  
15 Changing provisions of the Proposed Order based on information that has never been subject to  
16 public scrutiny, and without affording Respondents all of the procedural protections required by  
17 statutes, regulations, and constitutions, violates Respondents' due process rights. BCDC cannot  
18 properly make a decision based on information that is admittedly outside the record in this case.

19 **3. Objection to BCDC's failure to provide a fair trial**

20 Due process requires agencies to separate advocates from decision makers, and prohibits  
21 ex parte communications between them. *See Department of Alcoholic Beverage Control v.*  
22 *Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 5. An agency violates a party's  
23 constitutional due process right to an impartial trial when "rules mandating that an agency's  
24 internal separation of functions and prohibiting ex party communications" are not observed, or

1 when the totality of the circumstances creates an unacceptable risk of bias. *See Morongo Band*  
2 *of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.

3 BCDC's regulations, and the procedure used in this penalty proceeding, violate the  
4 requirement for separation of functions. The Executive Director issued the Violation  
5 Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement  
6 Investigation No. ER2010.013) ("VR/C"). But BCDC regulations call for the Executive Director  
7 to prepare a "recommended enforcement decision," Cal. Code Regs. tit. 14, §§ 11324, 11326,  
8 which is the province of the advisory team and the decision-makers. Because the Executive  
9 Director is given this special role, he is not being treated "like any other party[.]" *Morongo* at  
10 735. The Executive Director is effectively serving as a special advisor to the Enforcement  
11 Committee. This procedure violates Respondents' right to a fair trial.

12 At the Enforcement Committee hearing held on November 16, 2017, the Enforcement  
13 Committee simply adopted the Executive Directors' Recommended Enforcement Decision  
14 (albeit with a change to the recommended Cease and Desist and Civil Penalty Order No.  
15 2017.04). The Enforcement Committee members followed the Executive Director's  
16 recommendation, a member of the prosecution team, and the Enforcement Committee members  
17 will be inclined to follow the Executive Director's modification of the Recommended  
18 Enforcement Decision and/or other future recommendations. This further shows that the BCDC  
19 regulations (and the actual practice) violates the requirement for separation of functions and  
20 deprives Respondents of a fair trial.

21 Additionally, BCDC regulations state that the Executive Director must summarize "the  
22 essential allegations made by staff" and "all defenses and mitigating factors raised by the  
23 respondent(s)" as well as provide "a summary and analysis of all unresolved issues[.]" The

1 “analysis of all unresolved issues” is a decision-making function that has been delegated to the  
2 Executive Director (i.e., the prosecution team) in violation of Respondents’ right to a fair trial.  
3 The analysis of all unresolved issues should be performed by neutral decision-makers or their  
4 advisors. An actual analysis was never performed in this case; the Executive Director has  
5 provided only his own position instead of fairly evaluating the facts and the arguments of both  
6 sides.

7 BCDC has further violated Respondents’ right to a fair trial by failing to consider the  
8 statutorily mandated factors that must be considered when imposing a penalty. *See* Cal. Gov’t  
9 Code § 66641.9 (describing required considerations). At the Enforcement Committee hearing on  
10 November 16, 2017, the Enforcement Committee members acted arbitrarily and capriciously  
11 when determining the penalty amount they recommended to the full Commission. For example,  
12 Commissioners on the Enforcement Committee directly discussed arbitrary percentages of the  
13 Executive Director’s proposed penalty (e.g., Transcript at 124) and discussed the penalty amount  
14 in relation to such considerations as whether the amount “might keep us out of court” (Transcript  
15 at 137:4-5), whether it “is bad precedent to go below 50 percent on the fines” (Transcript at  
16 137:11). This shows that Respondents’ did not receive a fair trial and that BCDC has acted  
17 arbitrarily and capriciously, in violation of its statutory duties.

#### 18 **4. Objection to BCDC staff’s late addition of Allegation No. 23**

19 Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement Decision,  
20 Paragraphs II.H, II.J, III.B, IV.D, and IV.E of the attached Proposed Cease and Desist and Civil  
21 Penalty Order No. CDO 2018.01 (“Proposed Order”), and the attached “Revised Penalty Chart  
22 2017.11.06” set forth or reference the completely new Allegation No. 23, which relates to an  
23 allegedly unauthorized sign at the public boat launch. Allegation No. 23 was never asserted in  
24 the initial VR/C. The Revised Penalty Chart itself acknowledges that the alleged violation



1 occurred after the VR/C had already been issued. BCDC staff's attempt to tack on this last-  
2 minute allegation on the evening of November 6, 2017—a mere ten days before the first  
3 Enforcement Hearing—violates BCDC's regulations. Among other violations, staff failed to  
4 provide necessary notice and deprived Respondents of the opportunity to defend against the new  
5 allegation.

6 A. BCDC must comply with its own regulations

7 The law is clear that BCDC is required to comply with its own regulations. In particular,  
8 “[a] public entity has a ministerial duty to comply with its own rules and regulations where they  
9 are valid and unambiguous.” *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal. Ct. App.  
10 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999) (including  
11 duties codified in the California Code of Regulations). A duty is ministerial when there is a  
12 clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire Prot.*, 70  
13 Cal. App. 4th 962, 970 (1999). The rules discussed below are valid, unambiguous, and clearly  
14 defined, and therefore BCDC has a ministerial, rather than discretionary, duty to comply.

15 B. Violation of requirement to provide notice

16 Allegation No. 23 cannot be the subject of enforcement under Section 11386(e)(2) and  
17 (3) of BCDC's own regulations, which require a 35-day notice and opportunity to cure the  
18 alleged violations, and no such notice or opportunity to cure has been provided.

19 Section 11386 of Title 14 of the California Code of Regulations applies to an  
20 enforcement action if the Executive Director determines it is the case: “(1) that the alleged  
21 violation is one of the types identified in subsection 11386(e); (2) that the alleged violation has  
22 not resulted in significant harm to the Bay's resources or to existing or future public access; and  
23 (3) that the alleged violation can be corrected in a manner consistent with the Commission's laws

1 and policies.” Cal. Code Regs. tit. 14, § 11386(a). If Section 11386 applies to an alleged  
2 violation, “the Executive Director **shall** mail a written notice to the person(s) believed to be  
3 responsible for the alleged violation[.]” Cal. Code Regs. tit. 14, § 11386(b) (emphasis added).

4 Here, Allegation No. 23 fits squarely within the category of Section 11386(e)(3), which  
5 applies to “the failure to comply with any condition required by a Commission permit not  
6 covered by subsections (e)(1) and (e)(2)[.]” Cal. Code Regs. tit. 14, § 11386(e)(3). Additionally,  
7 the alleged violation has not resulted in significant harm, or indeed any harm, and, even if proved  
8 true, could be corrected in a manner consistent with the Commission’s laws and policies.  
9 Therefore, the regulations imposed a duty on the Executive Director to mail a written notice to  
10 the Respondents for Allegation No. 23, which is a requirement that staff has failed to fulfill. The  
11 written notice must comply with the requirements of § 11386(b).

12 The Recommended Enforcement Decision contends that none of the alleged violations  
13 Respondents identified in their Statement of Defense as requiring 35-day notice letters fall in the  
14 categories described by Section 11386, apparently for no other reason than because the  
15 Executive Director said so: “§ 11386 gives the Executive Director discretion to make these  
16 determinations, and he has made no such determination in this case.” (Recommended  
17 Enforcement Decision, p. 40.)

18 BCDC’s reading of the law is clearly erroneous. Under California law, when an agency  
19 makes a determination in accordance with rules and definitions established by regulations, the  
20 duty imposed on the agency is not discretionary but ministerial. *Goonewardene v. ADP, LLC*, 5  
21 Cal. App. 5th 154, 169 (Cal. Ct. App. 2016).

22 The California Code of Regulations imposes a duty on the Executive Director to  
23 determine whether an alleged violation falls under Section 11386 **in accordance with**

1 **established rules**; the Executive Director's "determination" is therefore necessarily constrained  
2 as he is only deciding whether the facts of an alleged violation fit any of the definitions that  
3 Section 11386 establishes for each category. Section 11386 provides valid, unambiguous, and  
4 clearly defined rules for classifying alleged violations under each category, and therefore staff  
5 had a ministerial duty to make determinations in accordance with those rules.

6 BCDC staff cannot instead claim that Section 11386 is intended to give the Executive  
7 Director unfettered discretion to disregard the regulations and arbitrarily choose whether alleged  
8 violations fall under Section 11386. Such an interpretation would render Section 11386  
9 meaningless. Furthermore, the Executive Director's supposed "determination" in this instance is  
10 additionally suspect because the Executive Director provides no reasoning or evidence for why  
11 Allegation No. 23 (or, for that matter, any of the allegations Respondents identified in their  
12 Statement of Defense as requiring 35-day notice letters) does not fit within the category of  
13 Section 11386(e)(3), which applies to "the failure to comply with any condition required by a  
14 Commission permit not covered by subsections (e)(1) and (e)(2)[.]" Neither does the Executive  
15 Director provide any explanation for why Allegation No. 23 or any other alleged violation has  
16 resulted in significant harm or could not be corrected in a manner consistent with the  
17 Commission's laws and policies.

18 Staff also asserts that it provided notice sending an email on August 3, 2017, regarding  
19 the public boat launch sign. (Recommended Enforcement Decision, p. 7.) However, BCDC's  
20 own regulations require that a notice letter must include each of the following:

- 21 (1) the nature of the alleged violation and each and every action that must be taken to  
22 correct the alleged violation;

1 (2) the fact that if the alleged violation is fully **corrected within 35 days** of the mailing  
2 of the notice, the Commission **shall not impose any civil penalty**; and

3 (3) the fact that if the alleged violation is not fully corrected within 35 days of mailing of  
4 the notice, the person believed to be responsible for the alleged violation may be subject  
5 to the payment of a civil penalty and may resolve the penalty portion of the alleged  
6 violation by paying the standardized fine specified in subsections (e), and (f) without  
7 having to go through a formal enforcement proceeding pursuant to Sections 11300  
8 through 11385 except as provided in subsection (h).

9 Cal. Code Regs. tit. 14, § 11386(b) (emphasis added). The August 3, 2017 email did not include  
10 notice that meets the requirements of paragraphs (2) and (3), and therefore does not constitute a  
11 proper notice letter.

12 In addition, the email indicates that staff was aware of Allegation No. 23 as early as  
13 August 2017, and could have followed the correct procedure of providing proper notice and  
14 including the allegation in a revised VR/C or a separate violation report/complaint at the time,  
15 but chose not to do so. Instead, staff waited more than three months after sending the email  
16 before finally attempting to slip in Allegation No. 23 a mere ten days before the Enforcement  
17 Hearing.

18 The Executive Director failed to send a proper 35-day notice letter to Respondents and  
19 provide them with the opportunity to correct the alleged violation. Until the Executive Director  
20 submits the 35-day notice letter, Allegation No. 23 cannot legally be the subject of an  
21 enforcement action. Contrary to arguments in the Recommended Enforcement Decision, nothing  
22 in BCDC's regulations allows staff to circumvent this requirement and simply tack on violations  
23 at the eleventh hour without following proper procedure.

1 C. Violation of requirement to issue allegations in the form of a violation report 45 days  
2 before Enforcement Hearing

3 In addition, under Section 11321(a) of BCDC's regulations, Allegation No. 23 cannot be  
4 the subject of enforcement. Section 11321(a) requires that staff issued the VR/C asserting the  
5 allegation at least 45 days prior to the Enforcement Hearing:

6 [T]he Executive Director **shall** commence Commission enforcement proceedings by  
7 **issuing at least 45 days prior to holding an enforcement hearing** on the matter the  
8 following materials:

9 (1) a violation report that complies with the format set out in Appendix H,

10 (2) a complaint for civil penalties that complies with the format set out in  
11 Appendix H if the staff seeks civil penalties, and

12 (3) a statement of defense form that complies with the format set out in Appendix I.

13 Cal. Code Regs. tit. 14, § 11321(a) (emphasis added). The rule is valid, unambiguous, and  
14 clearly defined that staff must issue materials (that comply with the format set out in Appendix H  
15 of BCDC's regulations) alleging Allegation No. 23 at least 45 days prior to the Enforcement  
16 Hearing, and therefore staff had a ministerial duty to comply. Staff did no such thing. Instead,  
17 staff has chosen to add the new violation only 10 days prior to the first Enforcement Hearing.

18 In addition, by failing to comply with BCDC's regulations, staff deprives Respondents of  
19 the opportunity to respond to Allegation No. 23. Section 11322(a) and (c) provide for  
20 Respondents to submit a defense to the allegations of a violation report/complaint within 35  
21 days. Cal. Code Regs. tit. 14, § 11322(a), (c). Respondents have already submitted their  
22 Statement of Defense and were unable to provide a response to this new Allegation No. 23  
23 before the date of the first Enforcement Hearing. Even if they could, Respondents would not be

1 given the requisite 35 days to prepare a defense to Allegation No. 23 as provided for by BCDC's  
2 regulations.

3 As discussed, staff certainly had the opportunity to issue a revised VR/C or a separate  
4 violation report/complaint 45 days in advance of the Enforcement Hearing, as staff mentioned  
5 the alleged facts in emails as early as August 2017. Respondents should not be punished for  
6 staff's choice to delay three months in a failure to follow their own regulations, thereby  
7 depriving Respondents of the basic right to defend against an allegation. Due to the violation of  
8 Section 11321(a), Allegation No. 23 cannot legally be the subject of an enforcement action.

9 D. Violation of constitutional due process obligations

10 Due to staff's violations of the procedures described above, BCDC staff has also violated  
11 its constitutional due process obligations. The California Supreme Court has confirmed that the  
12 requirements of due process extend to administrative adjudications. *Today's Fresh Start, Inc. v.*  
13 *Los Angeles Cty. Office of Educ.*, 57 Cal. 4th 197, 214 (2013). As stated by the Court, "when an  
14 administrative agency conducts adjudicative proceedings, the constitutional guarantee of due  
15 process of law requires a fair tribunal." *Morongo Band of Mission Indians v. State Water Res.*  
16 *Control Bd.*, 45 Cal. 4th 731, 737 (2009). It is also established law that "[t]he fundamental  
17 requirement of due process is the opportunity to be heard at a meaningful time and in a  
18 meaningful manner." *People v. Litmon* 162 Cal. App. 4th 383, 395 (2008); *see also B. C. Cotton,*  
19 *Inc. v. Voss*, 33 Cal. App. 4th 929, 954 (1995) (finding that "at a rock-bottom minimum due  
20 process requires some form of notice and an opportunity to respond"). Yet BCDC staff's actions  
21 here have made it impossible for Respondents to have a meaningful opportunity to be heard.

22 Because BCDC regulations effectively limit Respondents' right to present evidence to the  
23 already submitted Statement of Defense, staff cannot now introduce new evidence that

1 Respondents do not have an opportunity to respond to. If staff wish to assert Allegation No. 23,  
2 the proper procedure is for staff to withdraw the VR/C and begin the process again or to issue a  
3 separate violation report/complaint. Otherwise, BCDC staff's introduction of new evidence  
4 constitutes a violation of Respondents' due process rights in addition to violation of BCDC's  
5 regulations. For these reasons, Respondents request that the Enforcement Committee exclude  
6 Allegation No. 23 as improperly proposed, and strike the inclusion and reference of Allegation  
7 No. 23 from Sections III.B, V.J, VI.B, VI.C, and VI.I of the Recommended Enforcement  
8 Decision, Paragraphs II.H, II.J, III.B, IV.D, and IV.E of the attached Proposed Order, and the  
9 attached "Revised Penalty Chart 2017.11.06."

10 **5. Objection to late addition of information concerning "asphalt pad of unknown**  
11 **purpose"**

12 Section VI.Q of the Recommended Enforcement Decision and Paragraph III.F of the  
13 Proposed Order reference an allegedly unauthorized asphalt pad. In the VR/C, BCDC staff  
14 provided no information or evidence concerning this condition beyond referring to it as "an  
15 asphalt pad of unknown purpose." Because Respondents could not identify this supposed asphalt  
16 pad based solely on this ambiguous description, they denied that such a condition exists. BCDC  
17 staff now claims that the photograph showing this alleged asphalt pad was "inadvertently not  
18 included" and that to "correct this error" BCDC has added Exhibit B to the Recommended  
19 Enforcement Decision, which purports to be a photograph showing this asphalt pad.  
20 Respondents object to BCDC staff's submittal of additional evidence in an attempt to "correct  
21 this error" after Respondents have filed the Statement of Defense.

22 Under Section 11321(b) of BCDC's regulations, the VR/C must "refer to all documents  
23 on which the staff relies to provide a prima facie case[.]" Exhibit B was not included with the  
24 VR/C. By failing to comply with BCDC's regulations, staff deprives Respondents of the

1 opportunity to adequately respond to the allegation concerning this “asphalt pad of unknown  
2 purpose.” As discussed above, because BCDC regulations effectively limit Respondents’ right to  
3 present evidence to the already submitted Statement of Defense, staff cannot now introduce new  
4 evidence that Respondents do not have an opportunity to respond to. If staff wish to provide  
5 additional evidence concerning this “asphalt pad of unknown purpose[,]” the proper procedure is  
6 for staff to withdraw the VR/C and begin the process again. Otherwise, BCDC staff’s  
7 introduction of new evidence constitutes a violation of Respondents’ due process rights in  
8 addition to violation of BCDC’s regulations.

9 **6. Objection to BCDC staff’s use of hearsay evidence**

10 Respondents object to the hearsay evidence included in the Proposed Order. The  
11 Recommended Enforcement Decision states: “in light of Respondents’ objections, **none of the**  
12 **hearsay statements to which Respondents object is included in the findings in the proposed**  
13 **cease and desist and civil penalty order** that is part of the Recommended Enforcement  
14 Decision.” Despite this claim, three Paragraphs of the Proposed Order include the very facts that  
15 Respondents objected to as hearsay in the Statement of Defense:

- 16 • “Photographs taken on April 9, 2017 by a member of the public and provided to  
17 BCDC staff document that: (a) there is a single sign adjacent to Greco Island stating,  
18 “Sensitive Wildlife Habitat / Do Not Enter,” but the sign is so faded that it is almost  
19 illegible; (b) there are two other faded signs on Greco Island with no writing visible;  
20 and (c) there is no evidence of signs along the majority of the perimeter of Greco  
21 Island.” (Proposed Order, ¶ II.R.)
- 22 • “Photographs taken on June 5, 2016 and April 9, 2017 by a member of the public and  
23 provided to BCDC staff show a buoy in the Slough marked “Slow 10 MPH,” and two



1 photographs taken on June 6, 2016, show a ferry in the Slough generating a  
2 substantial wake.” (Proposed Order, ¶ II.S.)

- 3 • “By letter dated March 24, 2017, an interested organization, the Citizen’s Committee  
4 to Complete the Refuge (“CCCR”), brought to BCDC staff’s attention alleged  
5 violations of the following two permit conditions requiring Sanders to provide  
6 mitigation for project impacts:

7 1. Shorebird Roost Habitat Mitigation. Permit Special Condition II.F  
8 requires Sanders to provide, prior to commencement of work authorized  
9 under Phase 2 (i.e., the boatyard), approximately 3.0 acres of shorebird  
10 roost habitat mitigation, to replace such habitat lost as a result of the  
11 project. Special Condition II.F. provides that the habitat creation plans  
12 shall be reviewed and approved by or on behalf of the Commission after  
13 consultation with the U.S. Fish and Wildlife Service and California  
14 Department of Fish and Wildlife.

15 2. Non-tidal Wetland Mitigation. Permit Special Condition II.G requires  
16 Sanders to provide mitigation for the loss of 0.27 acres of non-tidal  
17 wetlands located in a drainage ditch on the Site by enlarging the wetlands  
18 in the remainder in the ditch and creating additional wetlands for a  
19 replacement ratio of at least 1:1. Special Condition II.G. provides that the  
20 habitat enhancement plans shall be reviewed and approved by the U.S.  
21 Fish and Wildlife Service and California Department of Fish and Wildlife,  
22 and also by or on behalf of the Commission.” (Proposed Order, ¶ II.V.)

1 In regards to Paragraphs R and S, BCDC staff relies heavily on the hearsay statements  
2 and photographs provided by CCCR that purport to demonstrate an absence of signage. As  
3 BCDC regulations make clear, inadmissible hearsay evidence alone is not sufficient in itself to  
4 support a finding of fact. Cal. Code Regs. tit. 14, § 13329. Additionally, these photos cannot, and  
5 do not, capture the entirety of Greco Island (as the photos, by their nature, only show a portion of  
6 a large area and do not show the entire perimeter, or even a majority of, the perimeter of Greco  
7 Island). BCDC staff has not provided any evidence that can support a finding that these signs are  
8 not in place. Paragraph V suffers from the same defects, as the “evidence” contained in the letter  
9 is inadmissible hearsay that cannot be used alone to support a finding of fact. *Id.* Indeed, the  
10 letter from Mr. Gaffney contains hearsay within hearsay, as Mr. Gaffney purports to explain  
11 findings by other members of this citizen group. And, notably, Mr. Gaffney’s letter does not  
12 even provide any proof that the mitigation was not complete.

13 BCDC staff continues to base their allegations on improper hearsay evidence despite  
14 claiming that that very same hearsay evidence would be removed. Respondents request that the  
15 Enforcement Committee strike the hearsay evidence relied on in Paragraphs R, S, and V.

16 Respondents also object to BCDC staff’s reliance on improper hearsay evidence to  
17 support the factual claim that “Respondents’ violations of the Permit’s public access  
18 requirements have resulted in the denial and loss of public access areas and improvements at the  
19 Site for an approximately eight-year period, from September 2009 to July 2017” and the  
20 Recommended Enforcement Decision’s repeated claims of an adverse effect on public access.  
21 (Recommended Enforcement Decision, p. 42; Proposed Order, ¶ IV.E.1.) BCDC staff relies only  
22 on years-old hearsay (and hearsay within hearsay) from “Laurence Frank,” “Matt Leddy,” and  
23 other unidentified “members of the public” who are not witnesses at this proceeding.

1 Respondents therefore request that the Enforcement Committee strike Paragraph IV.E.1. of the  
2 Proposed Order.

3 In addition, for the reasons described in Respondents' Objections to Letter and  
4 Attachment from Citizens Committee to Complete the Refuge (Attachment B) and Respondents'  
5 Objections to Declaration of Matthew Leddy (Attachment C), Respondents object to BCDC's  
6 reliance on the Citizens Committee to Complete the Refuge letter (dated November 3, 2017) and  
7 the Declaration of Matthew Leddy (dated November 2, 2017) as evidence. Respondents re-urge  
8 their objections to this hearsay evidence, and Respondents continue to object to the ruling made  
9 by Enforcement Committee Chair Scharff on November 16, 2017 (Transcript at 14:16 ("I'm  
10 going to allow the declarations in")). Respondents further object that such ruling shows that  
11 Respondents have not received a fair trial as the ruling is plainly contrary to law.

12 **7. Objections to BCDC staff's assertions of unverified factual claims**

13 The Recommended Enforcement Decision and the Proposed Order contain many  
14 unverified factual claims that are inadmissible statements because they are speculative assertions,  
15 improper expert opinion, and not based on any evidence in the enforcement record. Respondents'  
16 objections to the factual claims include:

17 Unverified Fact No. 1: BCDC staff repeatedly makes the factual claim that Monterey  
18 Cypress and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.  
19 (Recommended Enforcement Decision, pp. 6, 20-21, 23, 43; Proposed Order, ¶¶ II.U, IV.E.3.)  
20 Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case,  
21 and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14,  
22 § 11321(b). The Administrative Record contains absolutely no evidence that Monterey Cypress

1 and Poplar trees serve as habitats to raptors that allegedly prey on endangered birds.<sup>2</sup> BCDC staff  
2 has not established any evidentiary support for this factual claim, and therefore the claim is  
3 speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC  
4 staff has not established any expertise regarding the habitats of raptors or endangered birds.

5 Unverified Fact No. 2: BCDC staff repeatedly makes the factual claim that the alleged  
6 lack of visual barriers between the marina and the salt pond causes disturbance to water birds and  
7 affects sensitive habitats. (Recommended Enforcement Decision, pp. 5, 7, 27, 43; Proposed  
8 Order, ¶¶ II.B.5, II.T, IV.E.3.) Only documents referred to in the VR/C may be relied on by staff  
9 to establish a prima facie case, and the VR/C did not refer to any documents supporting this  
10 alleged fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely  
11 no evidence that the alleged lack of visual barriers has disturbed, or likely disturbed, water birds  
12 or negatively affected, or likely negatively affected, sensitive habitats. BCDC staff has not  
13 established any evidentiary support for this factual claim, and therefore the claim is speculative,  
14 unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not  
15 established any expertise regarding the water birds or habitats in question.

16 Unverified Fact No. 3: BCDC staff makes the factual claim that the current shorebird  
17 roost habitat does not provide the same functions and benefits for shorebirds as before. BCDC  
18 staff further asserts that “there is no way to remove or compensate for the past impacts to  
19 wildlife that have results from...the project’s adverse impacts to shorebird roosting habitat.”  
20 (Recommended Enforcement Decision, pp. 27-28, 43; Proposed Order, ¶¶ IV.E.3, IV.F.) Only  
21 documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and  
22 the VR/C did not refer to any documents supporting these alleged facts. Cal. Code Regs. tit. 14, §

---

<sup>2</sup> Any supposed evidence relied upon by BCDC staff to demonstrate environmental harm in the VR/C is inadmissible hearsay, as discussed here and in the Statement of Defense.

1 11321(b). The Administrative Record contains absolutely no evidence that the current shorebird  
2 roost habitat does not provide the same functions and benefits for shorebirds, that there have  
3 been any negative impacts, or likely negative impacts, to wildlife, or that the project has had an  
4 adverse impact, or likely adverse impact, on shorebird roosting habitat. BCDC staff has not  
5 established any evidentiary support for these factual claims, and therefore the claims are  
6 speculative, unverified, and conclusory. The claims are also improper opinion because BCDC  
7 staff has not established any expertise regarding shorebird roost habitats.

8 Unverified Fact No. 4: BCDC staff makes the factual claim that the alleged lack of buoys  
9 and signage results in, or likely results in, “adverse impacts” to wildlife and sensitive habitats.  
10 (Recommended Enforcement Decision, pp. 7, 25-27, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.)  
11 Only documents referred to in the VR/C may be relied on by staff to establish a prima facie case,  
12 and the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14,  
13 § 11321(b). The Administrative Record contains absolutely no evidence that there have been, or  
14 likely have been, “adverse impacts” to wildlife and sensitive habitats. BCDC staff has not  
15 established any evidentiary support for this factual claim, and therefore the claim is speculative,  
16 unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not  
17 established any expertise regarding the wildlife and sensitive habits in the marina.

18 Unverified Fact No. 5: BCDC staff makes the factual claim that the alleged lack of buoys  
19 identifying a “no wake” zone results in “adverse impacts” to wildlife and sensitive habitats.  
20 (Recommended Enforcement Decision, pp. 7, 25, 42; Proposed Order, ¶¶ II.B.4, IV.E.3.) Only  
21 documents referred to in the VR/C may be relied on by staff to establish a prima facie case, and  
22 the VR/C did not refer to any documents supporting this alleged fact. Cal. Code Regs. tit. 14, §  
23 11321(b). The Administrative Record contains absolutely no evidence that there have been, or

1 likely have been, “adverse impacts” to wildlife and sensitive habitats. BCDC staff has not  
2 established any evidentiary support for this factual claim, and therefore the claim is speculative,  
3 unverified, and conclusory. The claim is also an improper opinion because BCDC staff has not  
4 established any expertise regarding the wildlife and sensitive habits in the marina.

5 Unverified Fact No. 6: BCDC staff makes the general factual claim that “there is no way  
6 to recover or compensate for the adverse impacts to listed species and sensitive habitat that have  
7 occurred as a result of Respondents’ violations.” (Recommended Enforcement Decision, p. 43;  
8 Proposed Order, ¶ IV.F.) Only documents referred to in the VR/C may be relied on by staff to  
9 establish a prima facie case, and the VR/C did not refer to any documents supporting this alleged  
10 fact. Cal. Code Regs. tit. 14, § 11321(b). The Administrative Record contains absolutely no  
11 evidence that there have been, or likely have been, adverse impacts to listed or sensitive species  
12 and sensitive habitats. BCDC staff has not established any evidentiary support for the claim that  
13 any adverse impacts, or likely adverse impacts, have occurred, and therefore the claim is  
14 speculative, unverified, and conclusory. The claim is also an improper opinion because BCDC  
15 staff has not established any expertise regarding the wildlife and sensitive habits in the marina.

16 Unverified Fact No. 7: BCDC staff makes the factual claim that “Respondents’ violations  
17 of the Permit’s public access requirements have resulted in the denial and loss of public access  
18 areas and improvements at the Site for an approximately eight-year period, from September 2009  
19 to July 2017.” The Recommended Enforcement Decision also repeatedly asserts a claim of  
20 adverse effect on public access. (Recommended Enforcement Decision, p. 42; Proposed Order, ¶  
21 IV.E.1.) The Administrative Record contains absolutely no evidence that there has been a “denial  
22 and loss of public access areas and improvements[.]” BCDC staff has not established any  
23 evidentiary support for adverse impact or likely adverse impact, nor any support of alleged

1 denial of public access areas for eight years. BCDC staff has cited to only five alleged incidents<sup>3</sup>  
2 of public access issues in the span of fourteen years since the permit was granted, an  
3 exceptionally low number that does not support an alleged denial of public access. (VR/C, ¶¶ V,  
4 Y, X.) Therefore, this factual claim is speculative, unverified, and conclusory.

5 Unverified Fact No. 8: BCDC staff repeatedly makes factual claims about the state of  
6 mind of Respondents in allegedly failing to provide public access, such as the claim that  
7 Respondents “knowingly and intentionally deceived and misled the public for years by  
8 maintaining numerous unauthorized signs around the Site prohibiting public access.” BCDC staff  
9 also makes the claim that Respondents “actively prevented and discouraged public access for  
10 approximately eight years.” (Recommended Enforcement Decision, pp. 3, 6, 43; Proposed Order,  
11 ¶¶ IV.E.2, IV.K.). The Administrative Record contains absolutely no evidence that the public  
12 access was negatively impacted.<sup>4</sup> BCDC staff has not established any evidentiary support for the  
13 assertion that public access was negatively impacted. Furthermore, BCDC staff has not  
14 established any evidentiary support that Respondents deceived the public in allegedly denying  
15 public access. Therefore, these factual claims are speculative, unverified, and conclusory.

16 BCDC staff has presented no evidentiary support for their speculative, unverified, and  
17 conclusory assertions of factual claims. Respondents request that the Enforcement Committee  
18 strike these factual claims improperly contained in the Recommended Enforcement Decision and  
19 the Proposed Order. In addition, Respondents reiterate their denial and objections made in

---

<sup>4</sup> In support of these assertions, staff relies only on years-old hearsay (and hearsay within hearsay) from “Laurence Frank,” “Matt Leddy,” and other unidentified “members of the public” who are not witnesses at this proceeding. Even if this hearsay were admissible, which it is not, BCDC staff has cited to only a handful of alleged incidents of public access issues in the span of fourteen years since the permit was granted, an exceptionally low number that does not support an alleged denial of public access. (See VR/C, ¶¶ V, Y, X.)

Respondents' Statement of Defense to BCDC's assertions of untrue or objectionable statements of fact.

**8. Objection to BCDC staff's inclusion of alleged requirements by other agencies**

Respondents object to BCDC staff including findings in the Recommended Enforcement Decision and the Proposed Order that relate to alleged requirements by other agencies such as the U.S. Army Corps of Engineers and the Regional Water Quality Control Board. (*See* Recommended Enforcement Decision, p. 28; Proposed Order, ¶ II.X). Such findings are irrelevant in this proceeding. BCDC has no authority to assert violations on behalf of the U.S. Army Corps of Engineers or the Regional Water Quality Control Board.

**9. Objection to BCDC staff's improper assertions of Respondents' admissions**

BCDC staff has attributed a number of admissions to Respondents that Respondents never made, and such alleged admissions even conflict with Respondents' plain language in the Statement of Defense. All of these improper assertions of Respondents' alleged admissions show that Respondents have not received (and cannot receive) a fair trial under BCDC's regulations, which delegate decision-maker authority to the prosecution team. These improper assertions of Respondents' admissions include:

Improper Assertion No. 1: "Respondents admit that they did not provide access to the Phase 1B public access pathways until July 2017." (Recommended Enforcement Decision, p. 11.) As the basis for this supposed admission, BCDC staff cites to the Statement of Defense 51:5-7, which states: "Respondents promptly installed public access and Bay Trail signs around the Phase 3 area after Redwood City authorized Respondents to open the pathways in the area in July 2017." This statement by Respondents does not make the admission that BCDC staff imagines. Rather, Respondents **specifically denied** BCDC's allegations concerning public access pathways in the Statement of Defense 35:15-16. BCDC staff has chosen to willfully ignore this



1 denial, fabricating an admission from which BCDC staff then asserts “Respondents cannot  
2 escape their admission that they did not provide access to the Phase 1B public pathways until  
3 July 2017.” (Recommended Enforcement Decision, p. 17.) Respondents object to the assertion of  
4 this alleged admission in its entirety.

5 Improper Assertion No. 2: “Respondents essentially admit that they did not install public  
6 access signs while they were prohibiting access to the required Phase 1B public access areas.”  
7 (Recommended Enforcement Decision, p. 22.) Contrary to this claim, Respondents explicitly  
8 stated in the Statement of Defense that they maintained a sign near the Harbormaster’s office and  
9 installed “future extension of the Bay Trail” signs. (Statement of Defense, 50:11-15.)  
10 Respondents object to the assertion of this alleged admission in its entirety.

11 Improper Assertion No. 3: “[Respondents] concede that a reasonable reading of Permit is  
12 that this requirement must be met when public boat launch is operational.” (Recommended  
13 Enforcement Decision, p. 26.) Respondents object to this alleged admission because BCDC  
14 mischaracterizes it as a concession that the public boat launch and all other Phase 1B public  
15 access improvements were required by September 2009. *Id.* at 26. Respondents explicitly stated  
16 otherwise: that the triggering date was instead July 2017. (Statement of Defense, 59:5-22.)

17 Improper Assertion No. 4: “Respondents admit that there are three floating structures, as  
18 alleged by staff, that are used to hold (i.e., store) personal watercraft.” (Recommended  
19 Enforcement Decision, p. 31.) Respondents object to this alleged admission because BCDC  
20 mischaracterizes it as Respondents’ concession that they were not in compliance. Respondents  
21 have stated that they are in compliance because the floats do not constitute fill under  
22 Government Code § 66632(a). (Statement of Defense, 82:16-23.)

1        Improper Assertion No. 5: “Regardless of whether the structure is called a fuel dock or a  
2 service dock, Respondents admit that they modified the dock in 2014.” (Recommended  
3 Enforcement Decision, p. 32.) Respondents object to this alleged admission because it  
4 mischaracterizes Respondents’ statements. Respondents stated that they “shifted the [dock]  
5 opening in the float sections for the future straddle lift bay,” and that the “opening of the float  
6 sections did not require changes to any permanent structures (i.e., pilings) and remained wholly  
7 within the footprint of the dock as set out in the submitted plans.” (Statement of Defense, 84:4-  
8 13.)

9        Improper Assertion No. 6: “Special Condition II.AA. requires Respondents to provide the  
10 Commission verification that Respondents had sent updated nautical charts to NOAA...  
11 Respondents admit they failed to send staff the necessary verification timely.” (Recommended  
12 Enforcement Decision, p. 36.) Respondents object to this alleged admission because  
13 Respondents stated they had worked with NOAA staff to submit the required information and  
14 satisfy Special Condition II.AA. (Statement of Defense, 98:17-29.)

15        **10. Objection to imposition of excessive fines**

16        Respondents reiterate the objection made in the Statement of Defense that, even if all of  
17 BCDC staff’s allegations were true, the proposed fines are excessive and not commensurate with  
18 the alleged harm. The proposed fines are not based on the evidence in the Administrative  
19 Record and are not proper in light of the statutory factors that must be considered. The proposed  
20 fines also violate the U.S. Constitution’s Eighth Amendment prohibition on excessive fines and  
21 the California Constitution’s similar protection.

22        Under Government Code Section 66641.9, the Commission must consider multiple  
23 factors when imposing administrative civil liability, including the nature, circumstance, extent,  
24 and gravity of a violation. Additionally, related factors bear on whether a fine is

1 unconstitutionally excessive, including: (1) the defendants' culpability; (2) the relationship  
2 between the harm and the penalty; and (3) the penalties imposed in similar statutes. *People ex*  
3 *rel. Bill Lockyer v. R.J. Reynolds Tobacco Co.* (2006) 37 Cal.4th 707, 728.

4 In this case, even assuming all of BCDC staff's allegations were true, Respondents'  
5 culpability was low. Respondents' motivation for many of the activities that BCDC staff  
6 complain of has been public safety. For example, with respect to marking areas of the Site as  
7 restricted, Respondents sought to protect members of the public from physical injury that could  
8 occur as a result of construction activities and unsafe terrain in those areas. Respondents'  
9 motivation for other activities that BCDC staff complain of has been expanding public access.  
10 For example, installation of a rower's dock expands the public's access to the Bay by providing a  
11 spot for members of the public to launch kayaks and other personal watercraft. And for certain  
12 other activities complained of, Respondents' motivation has been protection of the environment.  
13 For example, Respondents' use of stenciled signage on the pavement to indicate specific public  
14 parking spots as "Public Parking" was motivated by a desire to minimize the number of posts at  
15 the Site that could be used as perches by birds of prey. Respondents' admirable motivations  
16 reflect low culpability.

17 Regarding the gravity of the alleged violations and the relationship between the harm and  
18 the penalty, BCDC staff's Proposed Order would impose a penalty that is grossly disproportional  
19 to any alleged harm. Additionally, the alleged harm is wholly unsupported by any evidence in  
20 the Administrative Record. The Proposed Order seeks to impose the statutory maximum amount  
21 of penalty (\$30,000) for almost all of the alleged violations. The statutory maximum penalty is  
22 not merited. While, the BCDC staff claims that there have been "substantial adverse impacts on  
23 public access" (Proposed Order ¶ IV.E.1), there is no evidence of such substantial adverse

1 impact in the Administrative Record. For example, there is not a single declarant that asserts that  
2 he or she has been denied public access to public facilities at Westpoint Harbor, let alone a  
3 *substantial* denial of access.

4       Regarding impact on the environment and Bay resources, BCDC staff does not even  
5 claim that there has actually been adverse impact or that any presumed adverse impact is  
6 substantial. If fact, there is no evidence of adverse impacts (substantial or insubstantial) on the  
7 environment or Bay resources in the Administrative Record. The lack of evidence is revealed  
8 even by reference to BCDC staff's procedurally improper effort to "clean-up" the Proposed  
9 Order, where BCDC staff changed the heading of civil penalty order paragraph IV.E.3. in draft  
10 Order No. 2017.04, from stating that "violations have had adverse impacts on Bay resources" to  
11 stating that "violations have likely had adverse impacts on Bay resources" (Proposed Order No.  
12 2018.01 ¶ IV.E.3 (emphasis added)). BCDC staff's evidence does not establish the existence or  
13 magnitude of any actual harm.

14       To the extent that BCDC staff is relying on the presumption of harm to public access, the  
15 environment, or Bay resources, Respondents object to such reliance as speculative. It is  
16 statutorily and constitutionally improper to presume harm in connection with BCDC's  
17 determination of administrative civil liability. Judge Kinnicutt's Statement of Decision on  
18 BCDC Order in *Sweeney and Point Buckler Club, LLC v. BCDC, et al.*, Case No. FCS048136 at  
19 9-10, Superior Court of the State of California, County of Solano, is a recent judicial decision  
20 that makes clear that assertions of "likely" impact are insufficient to warrant large fines.

21       A third factor that bears on Respondents' objection that the fines are excessive is the  
22 penalties imposed in similar statutes. Under U.S. Supreme Court case law, that factor is  
23 equivalent to "the sanctions imposed in other cases for comparable misconduct." *Cooper*

1 *Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). As described in the  
2 Statement of Defense, similar past BCDC cases have imposed much lower penalties than the  
3 more than half a million dollars sought against Respondents here. *See* Statement of Defense at  
4 111.

### 5 Conclusion

6 For the reasons set forth, Respondents object to the Recommended Enforcement Decision  
7 and its attachments. Respondents request that the Enforcement Committee exclude Allegation  
8 No. 23 as improperly proposed and strike inclusion of Allegation No. 23 from the Recommended  
9 Enforcement Decision, the Proposed Order, and the Revised Penalty Chart; strike the hearsay  
10 evidence improperly relied on in Paragraphs R, S, and V of the Proposed Order; strike alleged  
11 admissions improperly attributed to Respondents in the Recommended Enforcement Decision;  
12 strike unverified factual claims asserted in the Recommended Enforcement Decision and the  
13 Proposed Order; strike findings about alleged requirements by other agencies in the  
14 Recommended Enforcement Decision and the Proposed Order; and strike the statutorily and  
15 constitutionally excess fines from the Proposed Order. Respondents further request that they be  
16 allowed to cross-examine witnesses, that the Executive Director be instructed to follow his  
17 ministerial duties, and that Respondents be given a fair trial as is their right.

Dated: January 16, 2018

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Christopher J. Carr

CHRISTOPHER J. CARR (CA SBN 184076)

chris.carr@bakerbotts.com

KEVIN M. SADLER (CA SBN 283765)

kevin.sadler@bakerbotts.com

KEVIN E. VICKERS (CA SBN 310190)

kevin.vickers@bakerbotts.com

BAKER BOTTS L.L.P.

101 California Street, Suite 3600

San Francisco, California 94111

Telephone: (415) 291-6200

Facsimile: (415) 291-6300

Attorneys for Respondents

Mark Sanders and Westpoint Harbor, LLC

# Attachment A

1 CHRISTOPHER J. CARR (CA SBN 184076)

2 chris.carr@bakerbotts.com

3 KEVIN M. SADLER (CA SBN 283765)

4 kevin.sadler@bakerbotts.com

5 KEVIN E. VICKERS (CA SBN 310190)

6 kevin.vickers@bakerbotts.com

7 BAKER BOTTS L.L.P.

8 101 California Street, Suite 3600

9 San Francisco, California 94111

10 Telephone: (415) 291-6200

11 Facsimile: (415) 291-6300

12  
13 *Attorneys for Mark Sanders and Westpoint Harbor, LLC*

14  
15  
16 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

17  
18 IN THE MATTER OF:

19  
20 VIOLATION REPORT/COMPLAINT FOR THE  
21 IMPOSITION OF ADMINISTRATIVE CIVIL  
22 PENALTIES No. ER2010.013

23  
24 PROPOSED CEASE AND DESIST AND CIVIL  
25 PENALTY ORDER No. CDO 2017.04

26  
27 MARK SANDERS AND  
28 WESTPOINT HARBOR, LLC  
29

RESPONDENTS' RESPONSE TO STAFF'S  
OBJECTIONS TO DECLARATION OF MARK  
SANDERS



1 Respondents Mark Sanders and Westpoint Harbor, LLC (“Respondents”) submit the  
2 following response to the staff’s objections to the Declaration of Mark Sanders.

3 **Response to Staff’s Claim Regarding Sufficiency**  
4 **of Statements in Sanders’ Declaration to Support Findings of Fact**

5 For the reasons explained below, San Francisco Bay Conservation and Development  
6 Commission (“BCDC”) Staff is incorrect in asserting that certain statements in Mark Sanders’  
7 declaration (Respondents’ Statement of Defense, Exhibit No. 1) are hearsay. Nonetheless, even if  
8 Sanders’ declaration did contain hearsay, BCDC staff’s claim that such “hearsay statements are  
9 not sufficient to support a finding” is false. (See Executive Director’s Recommended  
10 Enforcement Decision, p. 48.) Sanders’ declaration has been submitted under penalty of perjury,  
11 and Sanders would be subject to cross-examination as provided by BCDC regulations, if BCDC  
12 staff had chosen to request cross-examination of Sanders. Cal. Code of Regs. tit. 14, §§ 11321,  
13 11322, 11327, 11329. BCDC staff cannot, by choosing not to cross-examine Sanders, legally  
14 preclude the use of statements found in Sanders’ declaration to support findings of fact.

15 **Response to Staff’s Objections**

16 **Paragraph 8:**

17 **Declaration Text:** “These meetings together with more detailed discussions with the U.S.  
18 Coast Guard (‘USCG’) and National Oceanic and Atmospheric Administration (‘NOAA’), prior  
19 to the issuance of the Permit, resulted in an agreement among all concerned that regular channel  
20 markers would be placed over the length of Westpoint Slough, but other buoys and markers in  
21 the navigable channel would not be allowed (other than an existing ‘no wake’ buoy and other  
22 marks already located in the channel by the Port of Redwood City).”

1       Objection: Staff objects to the above excerpt regarding any purported “agreement” about  
2 channel markers as hearsay.

3       Response: This excerpt is not hearsay because it is not being offered to prove the truth of  
4 the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect  
5 of the statement on Mark Sanders and why he took specific actions in his efforts to comply with  
6 the permit, while operating under the belief that an agreement about channel markers existed.

7                               Paragraph 9:

8       Declaration Text: “This of course was well understood by the USCG and NOAA  
9 representatives, who detailed the channel marks and locations as well as additional no-wake  
10 signage to be used, and made clear that the buoys 100 feet from Greco Island would not be  
11 allowed as they would constitute navigational hazards.”

12       Objection: Staff objects to the above excerpt regarding what was allegedly “well  
13 understood by the USCG and NOAA representatives,” as well as what these agencies allegedly  
14 “made clear” regarding the buoys as hearsay.

15       Response: This excerpt is not hearsay because it is not being offered to prove the truth of  
16 the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect  
17 of the statement on Mark Sanders and why he took specific actions in his efforts to comply with  
18 the permit, while operating under the belief that the USCG and NOAA representatives  
19 understood and made clear certain requirements.

20                               Paragraph 9:

21       Declaration Text: “This was clear to the source of this condition, Clyde Morris at the U.S.  
22 Fish and Wildlife Service (‘USFWS’), who quickly understood and the decision to use standard  
23 USFWS signs on the island was adopted.”

Objection: Staff objects to the above excerpt regarding what was allegedly “clear to ... Clyde Morris,” as well as what Clyde Morris allegedly “quickly understood” regarding the USFWS signs as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that a USFWS representative understood his decision regarding signage.

Paragraph 12:

**Declaration Text:** “BCDC staff required that the rowing facility be moved to the west side, and the harbor office, service dock (fuel, pumpout) moved to the east side, which required a number of design changes.”

Objection: Staff objects to the above excerpt regarding what allegedly “BCDC staff required,” concerning the rowing facility, harbor office, and service dock as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because “[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity.” Evid. Code, § 1220. BCDC staff’s own statements are admissible evidence and not hearsay.

Paragraph 29:

Declaration Text: “In a February 2007 meeting, Adrienne Klein questioned whether BCDC staff had received the dock plans.”

Objection: Staff objects to the above excerpt regarding what Adrienne Klein allegedly “questioned,” regarding the dock plans as hearsay.

Response: Under the Evidence Code, this excerpt is not hearsay because “[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity.” Evid. Code, § 1220. The declarant, Adrienne Klein, is a BCDC staff member, and therefore her statements are admissible evidence and not hearsay.

Paragraph 35:

Declaration Text: “Redwood City in issuing a conditional occupancy permit for Phase 1A required the future Phase 2 and 3 areas to be restricted from public access for safety reasons.”

**Objection:** Staff objects to the above excerpt stating that that in issuing a permit Redwood City allegedly “required,” areas to be restricted from public access as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that Redwood City required areas to be restricted from public access.

Paragraph 42:

Declaration Text: “In 2009, I coordinated with NOAA to update their Local Notice to Mariners to account for Westpoint Harbor. The NOAA representatives I worked with informed me that they would submit the required notification to BCDC, per their common practice.”

Objection: Staff objects to the above excerpt regarding what the NOAA representatives allegedly “informed” Mr. Sanders regarding submission of the required notification to BCDC, as well as what is allegedly considered NOAA’s “common practice” as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that the NOAA representatives would submit the required notification to BCDC and that such was their common practice.

Paragraph 46:

Declaration Text: “On March 14, 2012, I was asked by Bill Moyer, manager of Pacific Shores Center, to improve the fence between Westpoint Harbor and Pacific Shores in order to stop individuals from crossing the unsafe area on and over riprap placed in the ditch.”

Objection: Staff objects to the above excerpt regarding what Mr. Sanders allegedly “was asked by Bill Moyer,” regarding fence improvement as hearsay.

Response: This excerpt is not hearsay because it is not being offered to prove the truth of the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect of the statement on Mark Sanders and why he took specific actions in his efforts to comply with the permit, while operating under the belief that the Pacific Shores Center required him to improve the fence.

Paragraph 47:

Declaration Text: “Although the Violation Report/Complaint claims that BCDC staff confirmed with the onsite manager for Pacific Shores Center that there were no impediments to completing the trail between Pacific Shores Center and Westpoint Harbor, Yvette Montoya and Carey Liggett, property managers for Pacific Shores Center both disputed this statement when I spoke with them. The previous manager, Kris Vargas informed me that she was pushed by BCDC’s Adrienne Klein to assert that there was no impediment to opening the gate. Ms. Vargas

1 told me she was unwilling to make this statement and said she didn't want to put the public or  
2 employees at risk."

3 Objection: Staff objects to the above excerpt regarding what Yvette Montoya and Carey  
4 Liggett allegedly disputed, as well as what Kris Vargas allegedly informed Mr. Sanders about  
5 alleged pushback from Adrienne Klein as hearsay.

6 Response: This excerpt is not hearsay because it is not being offered to prove the truth of  
7 the matter asserted. Evid. Code, § 1200(a). Rather, the excerpt is being offered to show the effect  
8 of the statements on Mark Sanders and why he took specific actions in his efforts to comply with  
9 the permit, while operating under the belief that property managers for Pacific Shores Center  
10 considered there to be impediments to completing the trail between Pacific Shores Center and  
11 Westpoint Harbor. In addition, Adrienne Klein is a BCDC staff member whose statement to Kris  
12 Vargas is being offered against BCDC staff.

13 Paragraph 53:

14 Declaration Text: "In past discussions with BCDC staff concerning signage of the  
15 restrooms, BCDC staff agreed restroom and shower access could be controlled for the safety of  
16 tenants and others, and provided suggested designs on signage for this purpose."

17 Objection: Staff objects to the above excerpt stating what, BCDC staff allegedly "agreed"  
18 to concerning controlling restroom and shower access as hearsay.

19 Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a  
20 statement is not made inadmissible by the hearsay rule when offered against the declarant in an  
21 action to which he is a party in either his individual or representative capacity." Evid. Code,  
22 § 1220. BCDC staff's statement is admissible evidence and not hearsay.

1 Paragraph 72:

2 Declaration Text: "I hand-delivered the Westpoint Harbor Management and Operations  
3 Manual to Brad McCrea of BCDC in July 2007. BCDC staff even remarked on specific portions  
4 of the submittal when it was delivered in 2007. However, when I later discussed this submittal  
5 with Tom Sinclair in 2012, he admitted that he had never looked at the document."

6 Objection: Staff objects to the above excerpt regarding alleged remarks by BCDC staff as  
7 well as Tom Sinclair's alleged admission concerning a document as hearsay.

8 Response: Under the Evidence Code, this excerpt is not hearsay because "[e]vidence of a  
9 statement is not made inadmissible by the hearsay rule when offered against the declarant in an  
10 action to which he is a party in either his individual or representative capacity." Evid. Code,  
11 § 1220. BCDC staff's statements are admissible evidence and not hearsay. Similarly, Tom  
12 Sinclair was a BCDC staff member whose statement is being offered against BCDC in this case.

13 Conclusion

14 For the reasons set forth, Respondents request that the Enforcement Committee overrule  
15 BCDC staff's objections and admit the statements.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Christopher J. Carr

CHRISTOPHER J. CARR (CA SBN 184076)

chris.carr@bakerbotts.com

KEVIN M. SADLER (CA SBN 283765)

kevin.sadler@bakerbotts.com

KEVIN E. VICKERS (CA SBN 310190)

kevin.vickers@bakerbotts.com

BAKER BOTTS L.L.P.

101 California Street, Suite 3600

San Francisco, California 94111

Telephone: (415) 291-6200

Facsimile: (415) 291-6300

Attorneys for Respondents

Mark Sanders and Westpoint Harbor, LLC



# Attachment B

1 CHRISTOPHER J. CARR (CA SBN 184076)

2 chris.carr@bakerbotts.com

3 KEVIN M. SADLER (CA SBN 283765)

4 kevin.sadler@bakerbotts.com

5 KEVIN E. VICKERS (CA SBN 310190)

6 kevin.vickers@bakerbotts.com

7 BAKER BOTTS L.L.P.

8 101 California Street, Suite 3600

9 San Francisco, California 94111

10 Telephone: (415) 291-6200

11 Facsimile: (415) 291-6300

12  
13 *Attorneys for Mark Sanders and Westpoint Harbor, LLC*

14  
15  
16 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

17  
18 IN THE MATTER OF:

19  
20 VIOLATION REPORT/COMPLAINT FOR THE  
21 IMPOSITION OF ADMINISTRATIVE CIVIL  
22 PENALTIES No. ER2010.013

23  
24 PROPOSED CEASE AND DESIST AND CIVIL  
25 PENALTY ORDER No. CDO 2017.04

26  
27 MARK SANDERS AND  
28 WESTPOINT HARBOR, LLC  
29

RESPONDENTS' OBJECTIONS TO LETTER AND  
ATTACHMENT FROM CITIZENS COMMITTEE TO  
COMPLETE THE REFUGE

Respondents Mark Sanders and Westpoint Harbor, LLC (“Respondents”) object to the letter and attachment submitted by Citizens Committee to Complete the Refuge (“CCCR Letter”). The CCCR Letter is being used to introduce new purported evidence that should have been included with the Violation Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) (“VR/C”), and that Respondents should have had an opportunity to address in their Statement of Defense. The CCCR Letter has been submitted less than two weeks before the Enforcement Hearing, and Respondents received the CCCR Letter a mere 10 days before the Enforcement Hearing. Far from merely taking the form of a “public comment letter,” the letter is essentially improper testimony in the form of multiple assertions of unverified purported facts, improper purported expert opinions, as well as annotated purported exhibits allegedly supporting the same.<sup>1</sup> Under BCDC’s regulations, the CCCR Letter cannot be used as evidence to support any factual findings or any enforcement decision. Furthermore, as detailed in the specific objections below, many of the purported factual claims in the CCCR Letter are additionally inadmissible statements due to hearsay, improper opinion, speculative assertions, and lack of personal knowledge.

Respondents request that the Enforcement Committee strike the entirety of the CCCR Letter, or in the alternative, strike purported factual claims improperly contained in the CCCR Letter and exclude statements that are inadmissible under the Evidence Code.

#### **General Objection to the Entire CCCR Letter**

Respondents object to the entirety of the CCCR Letter as improper under BCDC’s regulations regarding hearsay evidence and introduction of new evidence. The CCCR Letter contains much alleged evidence being offered to support factual findings in of itself, including but not limited to: the effects of alleged lack of tree removal and buoy installation on the listed

---

<sup>1</sup> For example, the CCCR letter characterizes its own contents as “ample evidence” of a claim. (CCCR Letter, p. 4.)

1 clapper rail, western snowy plover, and salt marsh harvest mouse living on nearby Greco Island  
2 (CCCR Letter, pp. 3, 7-8); the characteristics of the Monterey cypress tree and Lombardy poplar  
3 tree that allegedly do not meet the requirements for high-suitability designation (CCCR Letter,  
4 pp. 3-4); the allegedly “ample evidence” that the Monterey cypress tree is used by predatory  
5 raptors (CCCR Letter, p. 4); the alleged lack of records regarding Westpoint Harbor found by the  
6 Coast Guard Commander (CCCR Letter, p. 6); the alleged level of activity and wakes generated  
7 by ferry services (CCCR Letter, pp. 6-7); and the alleged failure to provide a shorebird roost  
8 habitat and the alleged effects this had on shorebirds this year (CCCR Letter, pp. 8-9, 12-13). In  
9 addition, the letter includes what amounts to be newly created trial exhibits in the form of  
10 annotated and manipulated images designed by CCCR, such as images allegedly annotated with  
11 the locations of 85-foot setback requirements in the marina. (CCCR Letter, p. 11.)

12         The introduction of hearsay evidence offered to support factual findings in of itself is  
13 explicitly barred by BCDC’s procedural rules at this stage. Section 11329(b) of Title 14 of the  
14 California Code of Regulations states: “Hearsay evidence may be used for the purpose of  
15 supplementing or explaining other evidence but **shall not be sufficient in itself to support a**  
16 **finding** unless it would be admissible over objection in a civil action or unless it is in the form of  
17 a declaration under penalty of perjury or in the form of another document **referred to in a**  
18 **violation report or complaint for the imposition of civil penalties** and the declarant or author  
19 of the other document is subject to cross-examination as provided in Sections 11321, 11322, and  
20 11327.” Cal. Code Regs. tit. 14, § 11329(b). In addition, Section 11321(b) requires: “The  
21 violation report shall refer to all documents on which the staff relies to provide a prima facie  
22 case.” Cal. Code Regs. tit. 14, § 11321(b).

1 Here, the CCCR Letter was never “referred to in a violation report or complaint for the  
2 imposition of civil penalties”—indeed, at the time the VR/C was issued, the CCCR Letter did not  
3 exist. Cal. Code Regs. tit. 14, § 11329(b). Instead, the letter was submitted *more than three*  
4 *months after the VR/C was mailed*, and appears to be used to assert new purported facts to rebut  
5 Respondents’ Statement of Defense. Because the CCCR Letter was not submitted in compliance  
6 with proper procedures, under the California Code of Regulations, the letter is hearsay evidence  
7 that “shall not be sufficient in itself to support a finding” and therefore cannot be used as it is  
8 here to serve as the sole evidence of several factual claims. *Id.* In addition, BCDC staff cannot  
9 rely on the CCCR Letter in providing a prima facie case. Cal. Code Regs. tit. 14, § 11321(b).

10 “A public entity has a ministerial duty to comply with its own rules and regulations  
11 where they are valid and unambiguous.” *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal.  
12 Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999)  
13 (including duties codified in the California Code of Regulations). A duty is ministerial when  
14 there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire*  
15 *Prot.*, 70 Cal. App. 4th 962, 970 (1999). As discussed above, Section 11329(b) and Section  
16 11321(b) are valid, unambiguous, and clearly defined rules that do not allow hearsay evidence  
17 such as the CCCR Letter to be the sole evidence used to support a finding of fact when the letter  
18 was not referred to in the VR/C (and the author is not subject to cross-examination). Respondents  
19 therefore request the Enforcement Committee require BCDC staff to comply with its rules and  
20 strike the CCCR Letter in its entirety.

#### 21 Evidentiary Objections to CCCR Letter

22 In addition, Respondents submit the following evidentiary objections to the CCCR Letter.

1 Objection Number 1

2 Letter Text: "BCDC must assume that it is equally true that Westpoint Harbor's  
3 consistent failure to implement the protective measures required in the BCDC permit creates  
4 unacceptable risks, and possibly illegal impacts, to these species threatened by extinction and to  
5 their sensitive habitats." (CCCR Letter, p. 2.)

6 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
7 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
8 §§ 800, 803). The statement is an improper opinion because CCCR members have not been  
9 established as experts on what constitutes "unacceptable risks" or "possibly illegal impacts" to  
10 species. CCCR members have not established that they have personal knowledge of the same,  
11 and therefore the statement lacks foundation and is speculative.

12 Objection Number 2

13 Letter Text: "To date, Respondents have failed to remove trees which act as a potential  
14 perch for raptors that can then prey upon listed clapper rail, western snowy plover and salt marsh  
15 harvest mouse living on nearby Greco Island." (CCCR Letter, p. 3.)

16 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
17 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
18 §§ 800, 803). CCCR members have not established that they have personal knowledge of the  
19 alleged failure to remove trees, and therefore the statement lacks foundation and is speculative.  
20 The statement about raptors is an improper opinion because CCCR members have not been  
21 established as experts on the habitats and prey of raptors. CCCR members have not established  
22 that they have personal knowledge of the same, and therefore the statement lacks foundation and  
23 is speculative.

1 Objection Number 3

2 Letter Text: “The Monterey cypress does not exhibit any of the three characteristics  
3 required for High Suitability. The height at maturity is ‘80 feet’, well over the 25-foot limit  
4 (<http://dendro.cnre.vt.edu/dendrology/syllabus/factsheet.cfm?ID=191>), the shape is not  
5 columnar, but ‘generally broadly spreading,’ ([http://www.conifers.org/cu/Cupressus\\_](http://www.conifers.org/cu/Cupressus_macrocarpa.php)  
6 [macrocarpa.php](http://www.conifers.org/cu/Cupressus_macrocarpa.php)), and this species does not have fine limbs or closed, dense crown structure, but  
7 rather, ‘fairly sparse, often composed of few major limbs from near ground.’  
8 ([http://www.conifers.org/cu/Cupressus\\_macrocarpa.php](http://www.conifers.org/cu/Cupressus_macrocarpa.php)).” (CCCR Letter, p. 3.)

9 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
10 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200);  
11 lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court  
12 statement submitted for the truth of the matter asserted. In addition, the alleged information from  
13 the websites has not been verified or authenticated. CCCR members have not established that  
14 they have personal knowledge of the Monterey cypress tree, and therefore the statement lacks  
15 foundation and is speculative. In addition, the statement is an improper opinion because CCCR  
16 members have not been established as experts on the Monterey cypress tree.

17 Objection Number 4

18 Letter Text: “The Pacific Shores Center Landscape Tree Suitability Index contradicts  
19 Respondents’ assertions:

**Pacific Shores Center  
Suitability Analysis for Preliminary Landscape Palette  
Relative to Minimizing Raptor and Raven Nesting Suitability**

Tree Species	Tree Characteristics <sup>1</sup>	Landscaping Suitability Index <sup>1</sup>
<i>Populus nigra</i> Lombardy poplar	40 to 100 feet; dense columnar shape with upward reaching branches	Poor to Very Poor

(CCCR Letter, p. 4.)

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged information from the Pacific Shores Center Landscape Tree Suitability Index has not been verified or authenticated. CCCR members have not established that they have personal knowledge of the Lombardy poplar tree, and therefore the statement lacks foundation and is speculative. In addition, the statement is an improper opinion because CCCR members have not been established as experts on the Lombardy poplar tree.

Objection Number 5

Letter Text: “The property also provides potential foraging habitat for a variety of birds, including raptors, and bats that may forage or nest/roost within the adjacent Monterey cypress (*Hesperocyparis macrocarpa*) trees on site...’

‘Furthermore, raptors such as the Ferruginous hawk (*Buteo regalis*) and Northern harrier (*Circus cyaneus*) are known to winter in the Monterey area. The grove of Monterey cypress trees would be suitable for stopover or winter roosting for raptors...’

‘Peregrine Falcons nest in the Monterey cypress trees around the Hearn farm house.’”



1 (CCCR Letter, p. 4-5) (internal citations omitted).

2 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
3 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200);  
4 lack of authentication (Evid. Code, § 1401). The statement is hearsay because it is an out of court  
5 statement submitted for the truth of the matter asserted. In addition, the alleged information from  
6 the cited websites has not been verified or authenticated. CCCR members have not established  
7 that they have personal knowledge of the Monterey cypress trees or the habitats of raptors, and  
8 therefore the statement lacks foundation and is speculative. In addition, the statement is an  
9 improper opinion because CCCR members have not been established as experts on the Monterey  
10 cypress trees or the habitats of raptors.

11 Objection Number 6

12 Letter Text: “The Westpoint Marina has been operational since 2008. Yet, today  
13 Respondents have not installed and maintained a buoy system adjacent to the navigation channel  
14 of Westpoint Slough to identify the ‘No Wake’ speed zone, delineate the center of the channel  
15 for adequate draw, and discourage boaters from deviating out of the navigable channel.” (CCCR  
16 Letter, p. 5.)

17 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
18 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
19 established that they have personal knowledge of the alleged failure to install and maintain a  
20 buoy system, and therefore the statement lacks foundation and is speculative.

1 Objection Number 7

2 Letter Text: “In fact, there is undisputed testimony under penalty of perjury by Matthew  
3 Leddy that no buoys stating ‘no wake’ exist anyplace in Westpoint Slough and recent  
4 photographs attesting to that fact.” (CCCR Letter, p. 5.)

5 Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b); improper opinion  
6 (Evid. Code, §§ 800, 803). Under BCDC’s own regulations, any hearsay evidence including  
7 testimony from the Matthew Leddy declaration “shall not be sufficient in itself to support a  
8 finding” such as the existence of signs or the authenticity of photographs allegedly attesting to  
9 the same. Evidence from the Matthew Leddy declaration also cannot be relied on by BCDC staff  
10 to establish a prima facie case. In addition, the statement that the Matthew Leddy testimony is  
11 “undisputed” is an improper opinion.

12 Objection Number 8

13 Letter Text: “Respondents claim that ‘no wake’ buoys could not be installed in Westpoint  
14 Slough as a result of meetings with various agencies, and Coast Guard regulations... There is no  
15 evidence from government agencies, including the Coast Guard, about this Sanders claimed  
16 ‘agreement.’ BCDC included the buoy requirements in the permit in 2006 – so clearly no such  
17 non-buoy agreement had been reached.” (CCCR Letter, p. 6.)

18 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
19 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
20 §§ 800, 803). CCCR members have not established that they have personal knowledge of  
21 whether Respondents met with various agencies or reached an agreement with those agencies,  
22 and therefore the statement lacks foundation and is speculative. The statement that “clearly no  
23 such non-buoy agreement had been reached” is an improper opinion because it is an assumption

1 not rationally based on the perception of CCCR members, as the buoy requirements could have  
2 been included despite an initial or later agreement otherwise.

### 3 Objection Number 9

4 Letter Text: "Citizens Committee sent a FOIA to the Coast Guard for all records  
5 regarding placement of buoys in Westpoint Slough, and records regarding buoys/signs near  
6 Greco Island. After a thorough search the Coast Guard Commander responded on October 17,  
7 2017 that it had no records regarding Sanders, West Point Harbor Marina, or buoys in Westpoint  
8 Slough or near Greco Island for the period 2001 to the present." (CCCR Letter, p. 6.)

9 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
10 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
11 §§ 800, 803); hearsay (Evid. Code, § 1200). The Coast Guard Commander's alleged statement is  
12 hearsay because it is an out of court statement submitted for the truth of the matter asserted. The  
13 characterization of the Coast Guard's search as "thorough" is not based on personal knowledge,  
14 lacks foundation, is speculative, and constitutes improper opinion.

### 15 Objection Number 10

16 Letter Text: "The evidence submitted on the PROP high speed private ferry service is  
17 highly relevant as it shows that the existing red/green buoys, and single '10 MPH' buoy, is not  
18 working in refraining boats from creating substantial wakes. Not only have Respondents failed to  
19 ensure the installation and maintenance of required buoys identifying Westpoint Slough as a No  
20 Wake speed zone, they have allowed a commercial high-speed ferry service to operate at a  
21 harbor that was specifically approved for recreational boating." (CCCR Letter, p. 6.)

22 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
23 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,

1 §§ 800, 803). CCCR members have not established that they have personal knowledge of the  
2 alleged existence of “commercial high-speed ferry service” in the harbor or that Respondents  
3 allegedly “allowed” such operation, and therefore the statement lacks foundation and is  
4 speculative. The statement is an improper opinion because CCCR members have not been  
5 established as experts on what constitutes a “substantial wake.” The assumption that the current  
6 buoys and signage are allegedly not working is also not based on personal knowledge, is  
7 speculative, lacks foundation, and constitutes an improper opinion.

#### 8 Objection Number 11

9 Letter Text: “Last year, PROP’s high-speed catamarans were making four round trips/day  
10 during the work week, generating a significant wake from excessive speeds as they traversed a  
11 mile of Westpoint Slough along the shoreline of Greco Island between Redwood Creek and the  
12 harbor.” (CCCR Letter, pp. 6-7.)

13 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
14 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
15 §§ 800, 803). CCCR members have not established that they have personal knowledge of the  
16 alleged activity of “PROP’s high-speed catamarans,” and therefore the statement lacks  
17 foundation and is speculative. The statement is an improper opinion because CCCR members  
18 have not been established as experts on what constitutes a “substantial wake” or “excessive  
19 speeds.”

#### 20 Objection Number 12

21 Letter Text: “Respondents have failed to install and maintain buoys along Greco Island  
22 with signage prohibiting public access into the marshlands of the Refuge.” (CCCR Letter, p. 7.)

1       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
2 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
3 established that they have personal knowledge of the alleged failure to install and maintain buoys  
4 along Greco Island with signage, and therefore the statement lacks foundation and is speculative.

5                               Objection Number 13

6       Letter Text: “In the absence of posted ‘sensitive habitat’ and ‘access restrictions’ signs on  
7 buoys, endangered species, including nesting Clapper Rail on Greco Island are at risk of being  
8 disturbed and harassed. Nests can be present from mid-March through August when many  
9 people are out on the Bay, and rails will abandon nests if disturbed by noise or other human  
10 activities.” (CCCR Letter, p. 7.)

11       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
12 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
13 established that they have personal knowledge of the activity of the nesting Clapper Rail or other  
14 species, and therefore the statement lacks foundation and is speculative. The statement that  
15 endangered species “are at risk of being disturbed and harassed” due to the alleged absence of  
16 signs is an improper opinion because it is an assumption not based on the perception of CCCR  
17 members, and CCCR members have not been established as experts regarding the nesting  
18 Clapper Rail or other species.

19                               Objection Number 14

20       Letter Text: “On April 9, 2017, photographs were taken from the water on Westpoint  
21 Slough, and these have been submitted to BCDC as testimony under penalty of perjury by  
22 Matthew Leddy.” (CCCR Letter, p. 8.)

1       Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b). Under BCDC's  
2 own regulations, any hearsay evidence including testimony from the Matthew Leddy declaration  
3 "shall not be sufficient in itself to support a finding" such as the alleged authenticity of  
4 photographs. Evidence from the Matthew Leddy declaration also cannot be relied on by BCDC  
5 staff to establish a prima facie case.

6                               Objection Number 15

7       Letter Text: "To date, Respondents have failed to install and maintain visual barriers to  
8 protect waterbirds from disturbance, and have failed to obtain plan approval for a visual barrier."  
9 (CCCR Letter, p. 8.)

10       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
11 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
12 established that they have personal knowledge of the alleged failure to install and maintain visual  
13 barriers, and therefore the statement lacks foundation and is speculative.

14                               Objection Number 16

15       Letter Text: "Citizens Committee is concerned that failure to implement this Permit  
16 condition has resulted in the degradation of the adjacent shorebird habitat, including the area that  
17 was supposed to be set aside as mitigation for the loss of roosting habitat from project  
18 construction." (CCCR Letter, p. 9.)

19       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
20 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
21 §§ 800, 803). CCCR members have not established that they have personal knowledge of the  
22 alleged "degradation of the adjacent shorebird habitat," and therefore the statement lacks  
23 foundation and is speculative. The statement that the alleged degradation is the result of an

1 alleged failure to implement a permit condition is an improper opinion because CCCR members  
2 have not been established as experts on shorebird habitats.

3 Objection Number 17

4 Letter Text: “However, the only place in the marina where this particular parking pattern  
5 matches Bohley’s Section A on Google earth is marked A in highlight below: [image annotated  
6 with alleged location of Bohley’s Section A].

7 “The measurement on Google Earth confirms the 89-foot distance measured by Bohley at  
8 Location A. However, Bohley apparently measured the distance from the edge of the parking lot  
9 to the salt pond bottom where the levee is at its widest in the active Marina area. The Marina  
10 does not meet the 85-foot requirement at Locations B, C, D, E, F, G, H, I or J below. Here are  
11 other measurements using the same methods in Google earth: [image annotated with alleged  
12 locations that do not meet requirements].” (CCCR Letter, p. 11.)

13 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
14 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
15 §§ 800, 803). The images included have been manipulated and annotated by CCCR members to  
16 allegedly indicate the locations of 85-foot setback requirements in the marina. The statement and  
17 accompanying images, including those annotations, constitute improper opinion because CCCR  
18 members have not been established as experts on GPS coordinates or geographic calculations.  
19 The statement and accompanying images therefore also lack foundation and are speculative.  
20 CCCR members have also not established that they have personal knowledge of the locations of  
21 85-foot setback requirements in the marina, and therefore the statement and annotations inserted  
22 on the images lack foundation, are speculative, and constitute improper opinion.

1 Objection Number 18

2 Letter Text: "To date, Respondents have not provided 3 acres of shorebird roost habitat  
3 with similar functions and benefits." (CCCR Letter, p. 12.)

4 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
5 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
6 §§ 800, 803). CCCR members have not established that they have personal knowledge of the  
7 alleged failure to provide 3 acres of shorebird roost habitat, and therefore the statement lacks  
8 foundation and is speculative.

9 Objection Number 19

10 Letter Text: "The August 17, 2001 LSA Biotic Resources Report prepared for the  
11 Westpoint Marina project stated that during a March, 2001 site inspection over 1,000 birds were  
12 observed roosting on the high ground in the southwest corner of the site and that shorebird use of  
13 the salt ponds had been documented since late 1980. The 3.0 acres of roost habitat was to be  
14 recreated on the south side of the levee separating the marina from the remaining bittern pond.  
15 The recreated roost habitat was to be high ground remaining exposed year-round, provide  
16 isolation and limited disturbance, and serve as an island, surrounded by open water, to provide  
17 shorebirds and other waterfowl with a protected roost." (CCCR Letter, p. 12.)

18 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
19 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
20 §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The  
21 statement allegedly from the August 17, 2001 LSA Biotic Resources Report is hearsay because it  
22 is an out of court statement submitted for the truth of the matter asserted. In addition, the alleged  
23 information from the August 17, 2001 LSA Biotic Resources Report has not been verified or



1 authenticated. CCCR members have not established that they have personal knowledge of the  
2 roost habitat or the plans of that habitat, and therefore the statement lacks foundation and is  
3 speculative.

#### 4 Objection Number 20

5 Letter Text: “In addition, the habitat creation plans were to be reviewed and approved by  
6 BCDC after consultation with the U.S. Fish and Wildlife Service and the California Department  
7 of Fish and Wildlife. Respondents never created the required habitat plans, BCDC did not  
8 approve such plans, nor did Respondents consult about such plans with the U.S. Fish and  
9 Wildlife Service and the California Department of Fish and Wildlife to ensure that the  
10 replacement habitat maintained similar functions and benefits for shorebirds.

11 “Three acres of replacement shorebird roost habitat with similar functions and benefits  
12 has not been provided on the south side of the levee separating the marina from the remaining  
13 bittern pond, or in an alternate location. The ‘replacement’ habitat which has been provided -  
14 without consultation with the resource agencies – does not have similar functions and benefits as  
15 the original habitat. This is in part because the required consultation and approval of habitat  
16 plans never occurred.” (CCCR Letter, p. 12.)

17 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
18 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
19 §§ 800, 803). CCCR members have not established that they have personal knowledge of  
20 whether Respondents created habitat plans or whether Respondents consulted with resource  
21 agencies about the plan, and therefore the statement lacks foundation and is speculative. The  
22 statement that the replacement habitat “does not have similar functions and benefits as the  
23 original habitat” is an improper opinion because CCCR members have not been established as

1 experts on shorebird roost habitats. The statement about the replacement habitat therefore also is  
2 not based on personal knowledge, lacks foundation, and is speculative.

3 Objection Number 21

4 Letter Text: “Respondents’ ‘replacement habitat’ is at a lower elevation than the original  
5 habitat. During the winter as water levels rise the acreage of the replacement habitat shrinks and  
6 at certain times of year there is zero roosting habitat. For example, this year as winter rains filled  
7 the former bittern pond lying south of the project site, by early spring roosting shorebirds were  
8 limited to the levee along the southern edge of Westpoint Marina. By mid-spring, during peak  
9 migration, shorebirds had abandoned this now-submerged pond altogether because of the  
10 absence of roosting habitat.” (CCCR Letter, p. 12.)

11 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
12 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
13 §§ 800, 803). CCCR members have not established that they have personal knowledge of  
14 Respondents’ replacement habitat or the activity of shorebirds in it, and therefore the statement  
15 lacks foundation and is speculative. The statement attributing the alleged abandonment of the  
16 shorebirds to the elevation level of the habitat is an improper opinion because CCCR members  
17 have not been established as experts on shorebird roost habitats.

18 Objection Number 22

19 Letter Text: “Given that Respondents did not create the habitat, nor consult with the  
20 required agencies about habitat plans, the Manager’s response does not change that Respondents  
21 are responsible for this mitigation and have failed to implement and maintain the shorebird  
22 roosting habitat.” (CCCR Letter, p. 13.)

1       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
2 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
3 established that they have personal knowledge of the alleged failure to create the habitat or  
4 consult with required agencies, and therefore the statement lacks foundation and is speculative.

5                               Objection Number 23

6       Letter Text: “To date, Respondents have not ‘enhanced and enlarged wetlands’ in the  
7 remainder of the drainage ditch or on isolated fringes of the project site at a replacement ratio of  
8 at least 1:1. Also, Respondents have not prepared habitat plans or had such plans approved by  
9 state and federal agencies.” (CCCR Letter, p. 14.)

10       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
11 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). CCCR members have not  
12 established that they have personal knowledge about whether Respondents enhanced and  
13 enlarged wetlands, whether Respondents prepared habitat plans, or whether Respondents had  
14 such plans approved by state or federal agencies, and therefore the statement lacks foundation  
15 and is speculative.

16                               Objection Number 24

17       Letter Text: “The 10-inch pipe is clearly identified in Figure 3 of the Mitigation Site on  
18 page 11 of the Wetland Mitigation and Monitoring Plan (WMMP). This Figure 3 is missing from  
19 SOD Exhibit 93 submitted by Respondents, but Citizens Committee has a copy as a result of a  
20 FOIA response from the Army Corp. Figure 3 is reprinted below. [Image allegedly depicting  
21 Figure 3.]” (CCCR Letter, p. 10.)

22       Grounds for Objection: Hearsay (Evid. Code, § 1200); lack of authentication (Evid.  
23 Code, § 1401). The image of “Figure 3” allegedly from the Army Corp is hearsay because it is an

1 out of court statement submitted for the truth of the matter asserted. In addition, the alleged  
2 image of "Figure 3" has not been verified or authenticated.

3 **Conclusion**

4 For the reasons set forth, Respondents request that the Enforcement Committee strike the  
5 entire CCCR Letter, or in the alternative, strike factual claims improperly contained in the letter  
6 and exclude statements that are inadmissible under the Evidence Code.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Christopher J. Carr

CHRISTOPHER J. CARR (CA SBN 184076)

chris.carr@bakerbotts.com

KEVIN M. SADLER (CA SBN 283765)

kevin.sadler@bakerbotts.com

KEVIN E. VICKERS (CA SBN 310190)

kevin.vickers@bakerbotts.com

BAKER BOTTS L.L.P.

101 California Street, Suite 3600

San Francisco, California 94111

Telephone: (415) 291-6200

Facsimile: (415) 291-6300

Attorneys for Respondents

Mark Sanders and Westpoint Harbor, LLC

# Attachment C

1 CHRISTOPHER J. CARR (CA SBN 184076)

2 chris.carr@bakerbotts.com

3 KEVIN M. SADLER (CA SBN 283765)

4 kevin.sadler@bakerbotts.com

5 KEVIN E. VICKERS (CA SBN 310190)

6 kevin.vickers@bakerbotts.com

7 BAKER BOTTS L.L.P.

8 101 California Street, Suite 3600

9 San Francisco, California 94111

10 Telephone: (415) 291-6200

11 Facsimile: (415) 291-6300

12  
13 *Attorneys for Mark Sanders and Westpoint Harbor, LLC*

14  
15  
16 SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

17  
18 IN THE MATTER OF:

19  
20 VIOLATION REPORT/COMPLAINT FOR THE  
21 IMPOSITION OF ADMINISTRATIVE CIVIL  
22 PENALTIES No. ER2010.013

23  
24 PROPOSED CEASE AND DESIST AND CIVIL  
25 PENALTY ORDER No. CDO 2017.04

26  
27 MARK SANDERS AND  
28 WESTPOINT HARBOR, LLC  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

RESPONDENTS' OBJECTIONS TO

DECLARATION OF MATTHEW LEDDY

1 Respondents Mark Sanders and Westpoint Harbor, LLC (“Respondents”) object to the  
2 Declaration of Matthew Leddy (“Leddy Declaration”). The Leddy Declaration is being used to  
3 introduce new purported evidence that should have been included with the Violation  
4 Report/Complaint for the Imposition of Administrative Civil Penalties (Enforcement  
5 Investigation No. ER2010.013) (“VR/C”), and that Respondents should have had an opportunity  
6 to address in their Statement of Defense. Instead, the Leddy Declaration has been submitted less  
7 than two weeks before the Enforcement Hearing, and improperly offers factual claims standing  
8 on their own as well as annotated exhibits allegedly supporting the same. Under BCDC’s own  
9 regulations, the entirety of the Leddy Declaration cannot be used as evidence to support any  
10 factual findings or any enforcement decision. Furthermore, as detailed in the specific objections  
11 below, many of the factual claims in the Leddy Declaration are inadmissible statements due to  
12 improper opinion, speculative assertions, and lack of personal knowledge.

13 Declarants request that the Enforcement Committee strike the entire Declaration of  
14 Matthew Leddy, or in the alternative, strike factual claims improperly contained in the  
15 declaration and exclude statements that are inadmissible under the Evidence Code.

#### 16 **General Objection to the Entire Leddy Declaration**

17 Respondents object to the entirety of the Leddy Declaration as improper under BCDC’s  
18 own regulations regarding hearsay evidence and the introduction of new evidence. The  
19 declaration contains much alleged evidence being offered to support factual findings in of itself,  
20 including but not limited to: the alleged absence of buoys and signage in Westpoint Slough  
21 (Leddy Decl., ¶¶ 7-29, 46-56); the alleged absence of information signs at Westpoint Marina  
22 (Leddy Decl., ¶¶ 30, 31); the alleged commercial ferry operation in Westpoint Slough and its  
23 effects (Leddy Decl., ¶¶ 33-35); the alleged absence of fencing along Westpoint Marina and its

1 effects (Leddy Decl., ¶¶ 37-40); the alleged absence of visual barriers to the Cargill salt pond and  
2 its effects (Leddy Decl., ¶¶ 41-42); and the alleged signs prohibiting public access (Leddy Decl.,  
3 ¶¶ 43-45). In addition, the declaration includes what amounts to be newly created trial exhibits  
4 containing annotations from the Declarant, such as annotations about fencing along Westpoint  
5 Martina (exhibits M and N), annotations of alleged disturbance to the Cargill salt pond (Exhibits  
6 Q and R), and annotations of alleged locations of signs and buoys in Westpoint Slough as well as  
7 a chart of Declarant's notes and comments about the same (Exhibit EE).

8       The introduction of hearsay evidence offered to support factual findings in of itself is  
9 explicitly barred by BCDC's procedural rules at this stage. Section 11329(b) of Title 14 of the  
10 California Code of Regulations states: "Hearsay evidence may be used for the purpose of  
11 supplementing or explaining other evidence but **shall not be sufficient in itself to support a**  
12 **finding** unless it would be admissible over objection in a civil action or unless it is in the form of  
13 a declaration under penalty of perjury or in the form of another document **referred to in a**  
14 **violation report or complaint for the imposition of civil penalties** and the Declarant or author  
15 of the other document is subject to cross-examination as provided in Sections 11321, 11322, and  
16 11327." Cal. Code Regs. tit. 14, § 11329(b). In addition, Section 11321(b) requires: "The  
17 violation report shall refer to all documents on which the staff relies to provide a prima facie  
18 case." Cal. Code Regs. tit. 14, § 11321(b).

19       Here, the Leddy Declaration was never "referred to in a violation report or complaint for  
20 the imposition of civil penalties"—indeed, at the time the VR/C was issued, the Leddy  
21 Declaration did not exist. Cal. Code Regs. tit. 14, § 11329(b). Instead, the declaration was  
22 submitted not only *more than three months after the VR/C was mailed*, but after Respondents had  
23 already filed their Statement of Defense. Because the Leddy Declaration was not submitted in



1 compliance with proper procedures, the California Code of Regulations mandate that the  
2 declaration is hearsay evidence that “shall not be sufficient in itself to support a finding” and  
3 therefore cannot be used as it is here to serve as the sole evidence of several factual claims. *Id.* In  
4 addition, BCDC staff cannot rely on the Leddy Declaration in providing a prima facie case. Cal.  
5 Code Regs. tit. 14, § 11321(b).

6 “A public entity has a ministerial duty to comply with its own rules and regulations  
7 where they are valid and unambiguous.” *Galzinski v. Somers*, 2 Cal. App. 5th 1164, 1171 (Cal.  
8 Ct. App. 2016); *see also Gregory v. State Bd. of Control*, 73 Cal. App. 4th 584, 595 (1999)  
9 (including duties codified in the California Code of Regulations). A duty is ministerial when  
10 there is a clearly defined rule. *Redwood Coast Watersheds All. v. State Bd. of Forestry & Fire*  
11 *Prot.*, 70 Cal. App. 4th 962, 970 (1999). As discussed above, Section 11329(b) and Section  
12 11321(b) are valid, unambiguous, and clearly defined rules that do not allow hearsay evidence  
13 such as the Leddy Declaration to be the sole evidence used to support a finding of fact when the  
14 declaration was never referred to in the VR/C. Respondents therefore request the Enforcement  
15 Committee strike the Leddy Declaration in its entirety.

#### 16 **Evidentiary Objections to Leddy Declaration**

17 In the alternative, Respondents submit the following evidentiary objections to the Leddy  
18 Declaration.

#### 19 **Objection Number 1**

20 **Declaration Text:** “From the Pacific Shores Center public access walkway, adjacent to  
21 Westpoint Marina, I have observed, and taken photos of, Westpoint Slough, inter alia, on the  
22 dates listed below:

23 August 3, 2012 - See attached Photo A;

1 July 12, 2013 - See attached Photos B1 and B2;

2 July 17, 2014 - See attached Photos C1 and C2....” (Leddy Decl., ¶ 9.)

3 Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v.*  
4 *State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The photograph exhibits and text  
5 describing the exhibits are irrelevant because under the doctrine of laches, penalties cannot be  
6 assessed for any non-compliance allegedly occurring more than three years prior to the date on  
7 which the VR/C was mailed. Thus, evidence of any alleged non-compliance occurring before  
8 July 24, 2014 is irrelevant. Photograph exhibits A, B1, B2, C1, and C2 were all taken prior to  
9 July 24, 2014 and therefore do not constitute relevant evidence.

10 Objection Number 2

11 Declaration Text: “Photographs A through G4 are copies of the same photographs that  
12 were submitted to BCDC on my behalf on March 10, 2017, and inform my opinion about the  
13 absence of buoys and required signage in Westpoint Slough.” (Leddy Decl., ¶ 10.)

14 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
15 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
16 §§ 800, 803). The statement is an improper opinion because the referenced photos cannot  
17 reasonably be expected to provide a complete and accurate view of buoys and signage. Declarant  
18 has not established that he has personal knowledge of all the buoys and signage in Westpoint  
19 Slough, and therefore the statement lacks foundation and is speculative.

20 Objection Number 3

21 Declaration Text: “I took Photo A on August 3, 2012, at 10: 18 a.m. The photo was taken  
22 from the Pacific Shores Center looking towards the Westpoint Slough confluence with Redwood  
23 Creek. No buoy system identifying a ‘No Wake’ speed zone or delineating the center of the

1 channel were visible in the Slough. A true and correct copy of that photograph is attached hereto  
2 as Exhibit A.” (Leddy Decl., ¶ 11.)

3 Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v.*  
4 *State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying  
5 exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any  
6 non-compliance allegedly occurring more than three years prior to the date on which the VR/C  
7 was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is  
8 irrelevant.

9 Objection Number 4

10 Declaration Text: “I took Photo B1 on July 12, 2013, at 1:24 p.m. The photo was taken  
11 from the Pacific Shores Center looking towards the Westpoint Slough confluence with Redwood  
12 Creek. No buoy system identifying a ‘No Wake’ speed zone or delineating the center of the  
13 channel were visible in the Slough. A true and correct copy of that photograph is attached hereto  
14 as Exhibit B1.” (Leddy Decl., ¶ 12.)

15 Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v.*  
16 *State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying  
17 exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any  
18 non-compliance allegedly occurring more than three years prior to the date on which the VR/C  
19 was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is  
20 irrelevant.

21 Objection Number 5

22 Declaration Text: “I took Photo B2 on July 12, 2013, at 1:27 p.m. The photo was taken  
23 from the Pacific Shores Center. The photo is of Westpoint Slough looking towards the entrance

1 to Westpoint Marina. No buoy system identifying a 'No Wake' speed zone or delineating the  
2 center of the channel were visible in the Slough. A true and correct copy of that photograph is  
3 attached hereto as Exhibit B2." (Leddy Decl., ¶ 13.)

4 Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v.*  
5 *State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying  
6 exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any  
7 non-compliance allegedly occurring more than three years prior to the date on which the VR/C  
8 was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is  
9 irrelevant.

10 Objection Number 6

11 Declaration Text: "I took Photo C1 on July 17, 2014, at 12:20 p.m. The photo was taken  
12 from the Pacific Shores Center. The photo is of Westpoint Slough looking towards confluence  
13 with Redwood Creek. No buoy system identifying a 'No Wake' speed zone or delineating the  
14 center of the channel were visible in the Slough. A true and correct copy of that photograph is  
15 attached hereto as Exhibit C1." (Leddy Decl., ¶ 14.)

16 Grounds for Objection: Irrelevant (Evid. Code, § 350); barred by laches. *See Brown v.*  
17 *State Pers. Bd.*, 166 Cal. App. 3d 1151, (Ct. App. 1985). The statement and accompanying  
18 exhibit are irrelevant because under the doctrine of laches, penalties cannot be assessed for any  
19 non-compliance allegedly occurring more than three years prior to the date on which the VR/C  
20 was mailed. Thus, evidence of any alleged non-compliance occurring before July 24, 2014 is  
21 irrelevant.

## 1

2

7

## 3

4

8

1 the truth of the matter asserted regarding signage and access restrictions. Information from the  
2 alleged website and its photographs has not been verified or authenticated. In addition, the  
3 statement is an improper opinion because any alleged photographs cannot reasonably be  
4 expected to provide a complete and accurate view of signage and access restrictions at Westpoint  
5 Marina.

6 Objection Number 9

7 Declaration Text: "I became aware of commercial ferries operating in Westpoint Slough  
8 around February 2016 as the result of several news stories at that time." (Leddy Decl., ¶ 32.)

9 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
10 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); hearsay (Evid. Code, § 1200);  
11 lack of authentication (Evid. Code, § 1401). Declarant does not establish that he has personal  
12 knowledge of the alleged commercial ferries operating in Westpoint Slough around February  
13 2016, and therefore the statement lacks foundation and is speculative. The statement about  
14 alleged news stories is also hearsay because it is an out of court statement submitted for the truth  
15 of the matter asserted. In addition, information from the alleged news stories has not been  
16 verified or authenticated.

17 Objection Number 10

18 Declaration Text: "On June 6, 2016 at around 9 a.m., I observed a PROP catamaran ferry  
19 operating in Westpoint Slough. I was on the public walkway at the Pacific Shores Center  
20 property adjacent to Westpoint Marina when I saw the ferry. Based on my kayaking experience  
21 and observations of boats on a regular basis, I believe this ferry was traveling at a high speed  
22 (which I estimate at greater than 10 mph), and generating a substantial wake en route to  
23 Westpoint Marina." (Leddy Decl., ¶ 33.)

1       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
2 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
3 §§ 800, 803). The statement is an improper opinion because Declarant is not qualified as an  
4 expert on calculating the speed of a ferry or what constitutes a “substantial wake.” Declarant has  
5 not established that he has personal knowledge of the speed of the ferry or its destination, and  
6 therefore the statement lacks foundation and is speculative.

7                               Objection Number 11

8       Declaration Text: “As a result of internet research, I learned that PROP, a private  
9 commercial ferry service, began operating ferries in February 2016 between Tiburon, Emeryville  
10 and Westpoint Marina. Based on review of the company's website earlier this year, I believe that  
11 more ferries are being contemplated for routes between Redwood City and Alameda, Berkeley  
12 and San Francisco.” (Leddy Decl., ¶ 34.)

13       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
14 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
15 §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401).  
16 Declarant does not have personal knowledge of PROP or the nature of its ferry services and  
17 routes, and therefore the statement lacks foundation and is speculative. The statement about the  
18 alleged website is also hearsay because it is an out of court statement submitted for the truth of  
19 the matter asserted regarding PROP’s ferry service. In addition, information from the alleged  
20 website and its photographs has not been verified or authenticated. The second sentence in the  
21 above text is an improper opinion because Declarant’s belief that “more ferries are being  
22 contemplated” is not based on his own perception and he does not have personal knowledge of  
23 the statement. Therefore, that statement also lacks foundation and is speculative.

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3

Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code, §§ 800, 803); hearsay (Evid. Code, § 1200); lack of authentication (Evid. Code, § 1401). The statement is an improper opinion because Declarant is not qualified as an expert on the effects of high speed ferries or their wakes. Declarant has not established that he has personal knowledge of the effects of high speed ferries or their wakes, and therefore the statement lacks foundation and is speculative. The statement about the alleged articles is also hearsay because it is an out of court statement submitted for the truth of the matter asserted. In addition, information from the alleged articles has not been verified or authenticated.

Declaration Text: “My concerns about risks to the public and wildlife resulting from this Westpoint Marina ferry activity is only exacerbated by the absence of buoys delineating the center of the Westpoint channel and a ‘no wake’ zone.” (Leddy Decl., ¶ 36.)



1 expert on the effects of high speed ferries or their wakes. Declarant has not established that he  
2 has personal knowledge of the effects of high speed ferries or their wakes, and therefore the  
3 statement lacks foundation and is speculative.

4 Objection Number 14

5 Declaration Text: "On January 18, 2014, while looking for roosting shorebirds in the  
6 Cargill salt pond adjacent to the south side of Westpoint Marina, I observed and photographed  
7 three people walking out on the Cargill pond. I observed the people subsequently return to the  
8 Westpoint Marina. I was at a labeled public parking space at the Westpoint Marina, looking for  
9 birds, when I observed the people walking out on the Cargill pond. True and correct copies of the  
10 photographs I took on January 18, 2014 of people on the Cargill pond are attached hereto as  
11 Exhibits J and K." (Leddy Decl., ¶ 37.)

12 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
13 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702). Declarant has not established  
14 that he has personal knowledge of the identity of these three people, including whether they were  
15 merely Cargill employees, and therefore the statement lacks foundation and is speculative.

16 Objection Number 15

17 Declaration Text: "Based on this visit and my other observations at Westpoint Marina, it  
18 is my opinion that fencing along the southern boundary of the Westpoint Marina has never been  
19 installed." (Leddy Decl., ¶ 38.)

20 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
21 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
22 §§ 800, 803). Declarant has not established that he has personal knowledge of the fencing along  
23 the southern boundary of the Westpoint Marina, especially if he is basing this assumption on the

1 fact that he observed three unknown individuals on the Cargill pond who may or may not have  
2 been Cargill employees. The statement therefore lacks foundation and is speculative. The  
3 statement is also an improper opinion because it is not rationally based on the perception of the  
4 Declarant.

5 Objection Number 16

6 Declaration Text: "From my kayak in Westpoint Slough, I took a picture of the east side  
7 of the Westpoint Marina with my cellphone. My cellphone notes GPS coordinates and embeds  
8 these coordinates into the photo. I know the geographic location was 37°30'38.48"N, 122°1  
9 1'21.04"W 37, and the time was 11:04 a.m. I enlarged, divided and cropped the photo into two  
10 photos (Exhibits M and N) in order to show detail of the fencing along the east side of Westpoint  
11 Marina. I observed fencing in some areas and have inserted the locations of fencing observed in  
12 Exhibit M. I did not observe fencing in other areas and have inserted the locations where fencing  
13 was absent in Exhibit N. True and correct copies of that photograph are attached hereto as  
14 Exhibits M and N." (Leddy Decl., ¶ 39.)

15 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
16 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
17 §§ 800, 803). The statement regarding geographic location is an improper opinion because the  
18 Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his  
19 phone, the accuracy of which has not been authenticated or verified. The statement therefore also  
20 lacks foundation and is speculative. In addition, Declarant has not established that he has  
21 personal knowledge of the required locations for fencing on the eastside of the Westpoint  
22 Marina. Therefore, the annotations inserted on the photograph exhibits are not based on personal  
23 knowledge, lack foundation, are speculative, and constitute improper opinion.

## 1

2

6

## 7

8

1 red the location of the person exiting their automobile that I mention above.” (Leddy Decl., ¶  
2 42.)

3 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
4 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
5 §§ 800, 803). Declarant has not established that he has personal knowledge of the identity of this  
6 individual, including whether he or she was merely a Cargill employee, and therefore the  
7 statement lacks foundation and is speculative. Declarant has also not established that he has  
8 personal knowledge of the reason that the birds allegedly took flight, including whether the flight  
9 could have been triggered by any number of other variables aside from the presence of the  
10 individual, and therefore the statement lacks foundation and is speculative. For the same reasons,  
11 the annotations inserted on the photograph exhibits are not based on personal knowledge, lack  
12 foundation, are speculative, and constitute improper opinion.

#### 13 Objection Number 19

14 Declaration Text: “On August 14, 2012, I sent an email to Adrienne Klein at BCDC  
15 regarding signs and a barrier denying public access to Westpoint Marina. I have reviewed  
16 Document No. 45 in the Administrative Record for this matter. Document No. 45 is a true and  
17 correct copy of my August 14, 2012 email to Adrienne Klein at BCDC.” (Leddy Decl., ¶ 43.)

18 Grounds for Objection: Cal. Code Regs. tit. 14, §§ 11329(b), 11321(b). Under BCDC’s  
19 own regulations, any alleged evidence from this declaration “shall not be sufficient in itself to  
20 support a finding” such as the authenticity of documents in the Administrative Record, nor can  
21 alleged evidence from this declaration be relied on by BCDC staff to establish a prima facie case.

1

2

8

## 8

9

1 observation locations and summarizing my observations is attached hereto as Exhibit EE.”  
2 (Leddy Decl., ¶ 47.)

3 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
4 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
5 §§ 800, 803). The accompanying exhibit includes annotations of alleged locations of  
6 photographs as well as a chart of Declarant's notes and comments about signs and buoys. The  
7 Declarant is not qualified as an expert on GPS coordinates and was apparently relying on his  
8 phone to calculate geographic locations for his annotations and notes, the accuracy of which has  
9 not been authenticated or verified. Therefore, the statement and the accompanying exhibit are not  
10 based on personal knowledge, lack foundation, are speculative, and constitute improper opinion.  
11 Declarant has also not established that he has personal knowledge of the required locations for  
12 signs and buoys in Westpoint Slough, and therefore the statement and accompanying exhibit lack  
13 foundation, are speculative, and constitute improper opinion.

14 Objection Number 22

15 Declaration Text: “On April 9, 2017, I observed no signs on Greco Island at locations 1  
16 through inclusive, nor at locations 17, 19 or 20. Other than the signs and buoys photographed  
17 and described below, I observed found no other signs or buoys from the confluence of Westpoint  
18 Slough and First Slough to the confluence of Westpoint Slough and Redwood Creek, nor on  
19 Redwood Creek towards San Francisco Bay proper.” (Leddy Decl., ¶ 48.)

20 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
21 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
22 §§ 800, 803). The statement and accompanying exhibit, including annotations of alleged  
23 locations of the photographs, constitute improper opinion because the Declarant is not qualified

1 as an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
2 has not been authenticated or verified. The statement and accompanying exhibit therefore also  
3 lack foundation and are speculative. Declarant has also not established that he has personal  
4 knowledge of all signage and buoys in Westpoint Slough, and therefore the statement and  
5 annotations inserted on the photograph exhibits lack foundation, are speculative, and constitute  
6 improper opinion.

7 Objection Number 23

8 Declaration Text: "On April 9, 2017 at 11:51 a.m., at location #13, I observed a USFWS  
9 Refuge sign on Greco Island. The photo was taken from GPS coordinates 37°30'59.15"N,  
10 122°11'44.68"W. A true and correct copy of that photograph is attached hereto as Exhibit V."  
11 (Leddy Decl., ¶ 49.)

12 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
13 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
14 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
15 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
16 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
17 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
18 lack foundation and are speculative.

19 Objection Number 24

20 Declaration Text: "On April 9, 2017 at 11:54 a.m., at location #14, I observed another  
21 USFWS Refuge sign on Greco Island. The photo was taken from GPS coordinates  
22 37°30'59.57"N, 122°11'51.04"W. A true and correct copy of that photograph is attached hereto as  
23 Exhibit W." (Leddy Decl., ¶ 50.)

1       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
2 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
3 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
4 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
5 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
6 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
7 lack foundation and are speculative.

8                               Objection Number 25

9       Declaration Text: “On April 9, 2017 at 11:57 a.m., at location #15, I observed a faded  
10 sign on Greco Island. The photo was taken from GPS coordinates 37°31'1.03"N, 122°11'59.82"W.  
11 A true and correct copy of that photograph is attached hereto as Exhibit X.” (Leddy Decl., ¶ 51  
12 (misabeled as 50 in original).)

13       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
14 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
15 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
16 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
17 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
18 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
19 lack foundation and are speculative.

20                               Objection Number 26

21       Declaration Text: “On April 9, 2017 at 12:02 p.m., at location #16, I observed a faded  
22 sign on Greco Island. The photo was taken from GPS coordinates 37°31'3.16"N, 122°12'3.7"W.  
23 A true and correct copy of that photograph is attached hereto as Exhibit Y.” (Leddy Decl., ¶ 52.)



1       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
2 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
3 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
4 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
5 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
6 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
7 lack foundation and are speculative.

8                               Objection Number 27

9       Declaration Text: “On April 9, 2017 at 12:09 p.m., at location #18, I observed a faded  
10 ‘Sensitive Wildlife Habitat - No Not Enter’ sign in the water off Greco Island. The photo was  
11 taken from GPS coordinates 37°31'13.03"N, 122°12'11.85"W. A true and correct copy of that  
12 photograph is attached hereto as Exhibit Z.” (Leddy Decl., ¶ 53.)

13       Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
14 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
15 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
16 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
17 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
18 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
19 lack foundation and are speculative.

20                               Objection Number 28

21       Declaration Text: “On April 9, 2017 at 12:18 p.m., at location# 21, I observed a green  
22 buoy at the confluence of Redwood Creek and Westpoint Slough. The photo was taken from

1 GPS coordinates from 37°31'7.41"N, 122°12'15.89"W. A true and correct copy of that  
2 photograph is attached hereto as Exhibit AA.” (Leddy Decl., ¶ 54.)

3 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
4 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
5 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
6 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
7 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
8 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
9 lack foundation and are speculative.

10 Objection Number 29

11 Declaration Text: “On April 9, 2017 at 12:21 p.m., at location #22, I observed a red buoy  
12 at the confluence of Redwood Creek and Westpoint Slough. The photo was taken from GPS  
13 coordinates from 37°31'2.72"N, 122°12'13.64"W. A true and correct copy of that photograph is  
14 attached hereto as Exhibit BB.” (Leddy Decl., ¶ 55.)

15 Grounds for Objection: Lack of personal knowledge (Evid. Code, § 702(a)); lack of  
16 foundation (Evid. Code, § 403); speculation (Evid. Code, § 702); improper opinion (Evid. Code,  
17 §§ 800, 803). The statement and accompanying exhibits, including annotation of the alleged  
18 location of the photograph, constitute improper opinion because the Declarant is not qualified as  
19 an expert on GPS coordinates and was apparently relying on his phone, the accuracy of which  
20 has not been authenticated or verified. The statement and accompanying exhibits therefore also  
21 lack foundation and are speculative.

## 1

2

5

## 2

3

7

## 1

2  
3  
4  
5  
6  
7  
8

9  
0  
1  
2  
3  
4

5  
6  
7  
8  
9  
0  
1

23

1 803). Exhibit EE contains annotations of alleged locations of photographs as well as a chart of  
2 Declarant's notes and comments about signage and buoys. The Declarant is not qualified as an  
3 expert on GPS coordinates and was apparently relying on his phone to calculate geographic  
4 locations for his annotations and notes, the accuracy of which has not been authenticated or  
5 verified. The annotations and the chart therefore are not based on personal knowledge, lack  
6 foundation, are speculative, and constitute improper opinion. In addition, Declarant has not  
7 established that he has personal knowledge of the required locations for signage and buoys in  
8 Westpoint Slough, and therefore the annotations and the chart lack foundation, are speculative,  
9 and constitute improper opinion.

#### 10 **Conclusion**

11 For the reasons set forth, Respondents request that the Enforcement Committee strike the  
12 entire Declaration of Matthew Leddy, or in the alternative, strike purported factual claims  
13 improperly contained in the declaration and exclude statements that are inadmissible under the  
14 Evidence Code.

Dated: November 15, 2017

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Christopher J. Carr

CHRISTOPHER J. CARR (CA SBN 184076)

chris.carr@bakerbotts.com

KEVIN M. SADLER (CA SBN 283765)

kevin.sadler@bakerbotts.com

KEVIN E. VICKERS (CA SBN 310190)

kevin.vickers@bakerbotts.com

BAKER BOTTS L.L.P.

101 California Street, Suite 3600

San Francisco, California 94111

Telephone: (415) 291-6200

Facsimile: (415) 291-6300

Attorneys for Respondents

Mark Sanders and Westpoint Harbor, LLC